

ANGLIA RUSKIN UNIVERSITY

**REAL ESTATE INVESTMENT TRUSTS (REITS)
IN EUROPE
-
EUROPEANIZING TAX REGIMES**

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A Dissertation in partial fulfilment of the requirements of
Anglia Ruskin University, Cambridge, England,
for the degree of

PhD

Submitted: May 2015

ANGLIA RUSKIN UNIVERSITY

ABSTRACT

FACULTY OF ARTS, LAW AND SOCIAL SCIENCES

DOCTOR OF PHILOSOPHY

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE –
EUROPEANIZING TAX REGIMES

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May 2015

The research investigated the impact of EU law and policies on direct taxation in REITs, and movement towards a harmonised EU-REIT with common direct taxation of REITs profits. It represents the first comparative study of EU member state REIT regimes to identify an emerging common understanding informed by European jurisprudence and Europeanization policy and theory.

After identifying the fundamental elements of a REIT (following the original US model) within a context of Europeanization theory, the research examined EU policy mechanisms (such as goodness of fit and adaptational soft pressure) and the impact of relevant case law from the European Court of Justice. It then presented in-depth case studies of three member states: France (example of a well-established REIT regime), Bulgaria (a new accession state) and Spain (a recent REIT regime).

The research found an emerging common understanding between member states' REIT regimes, offering the prospect of a European harmonised REIT form distinguishable from the US model. It also found negative approaches to direct taxation in cross-border situations, and member state concerns about loss of sovereignty and tax base, which should be recognised within any harmonised direct tax regime.

The research can claim to be the first comparative analysis of MS REIT regimes to address a common understanding, and thus is relevant to practitioners and academics in the fields of European law and international taxation. It has potential to contribute towards an improved common direct taxation approach and the harmonisation of European REITs within the wider processes of Europeanization. The research was limited to REIT regimes in EU member states, and further research could analyse relevant member state tax regimes outside the 'common understanding' REIT model, and further explores issues of loss of sovereignty and tax base in member states.

Keywords: REITs, EU law, Sovereignty, Common direct taxation, Europeanization

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REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE –
EUROPEANIZING TAX REGIMES

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May 2015

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Section 1 – Introduction and Dimensions of Europeanization

Chapter I: Introduction to the Research – Challenging MSs Tax Regimes

1. Introduction

Financial Investments in Real Estate have strengthened in recent years with the ease of moving money in the global financial market. Globalisation has fuelled a hunger in Investors to extend their focus from domestic to international investments, motivated by beneficial tax regimes in the country where the investment target is located, allowing higher yields. International taxation is an evolving field, in which conflicting or converging interests between States, or between States and taxpayers, shape the applicable national rules.¹ The globalisation of real estate investment continues as new sources of capital flow into the sector, ranging from individuals to the largest institutions in the world. Investments in real estate provide relatively stable yields compared with the stock markets volatility, and have become attractive to investors, especially where foreign countries offer beneficial tax regimes. Governments are thrown into competition, making their tax regimes more attractive for foreign investors. Some governments have pushed down tax rates² or introduced tax free zones in their countries³ in what has been called a “race to the bottom”.⁴

¹ See Malherbe (2008), p. 1.

² See i.e. decreased corporate tax rate⁷ in the European Union (EU) i.e. in Bulgaria (10%, Cyprus and Ireland (12.5%) whereas the EU average is at 22.85% (see KPMG (2013)).

³ See in the EU Poland with its Economic free trade zone.

⁴ See Meisel (2004), p. 41. Races to the bottom are described in game theory by the prisoner's dilemma, originally framed by Merrill Flood and Melvin Dresher working at RAND in 1950. This is an exercise in which the optimal outcome for the entire group of participants results from cooperation of the participants, but it is put in danger by the fact that the optimal outcome for each individual is to not cooperate while the others do cooperate (see Poundstone (1993)).

REIT popularity grew as a result of increasing globalisation and the related cross-border flow of capital resources, looking to optimise their tax treatment through the use of applicable Double Tax Treaties (DTT). This is of little interest to the domestic shareholder in a domestic REIT, but rather for the non-domestic investor/shareholder. Due to the transparent “flow-through” tax treatment, dividends are distributed from the domestic REIT to the foreign shareholder without the dividend being taxed prior to its distribution at the level of the domestic REIT. Consequently, besides analysing the DTT situation applicable for their real estate investment at issue, foreign Investors also assess their choice of REIT according to the applicable tax treatment before investing into a foreign REIT (“REIT Shopping”). This research explores whether there is a “common understanding” in MSs REIT regimes in compliance with EU⁵ law or whether MSs share a kind of “negative understanding”, thus ignoring EU law. This development may be called the “Europeanization of MS tax regimes”.⁶

2. Literature review

The discrimination of the non-domestic shareholder in a foreign REIT continues to be a topic of debate with both academic and policy circles⁷ and questions remain unanswered regarding the concept to revise and/or adjust MSs REIT regimes to becoming compliant with EU law. Europeanization can result either from legislative means or New Modes of Governance⁸, and neither has been empirically addressed to a sufficient extent. Thus, this thesis can contribute to knowledge of the Europeanization of MSs REIT regimes, in particular, in relation to direct tax treatment, in MSs through legislative means and EU harmonisation activities.

Since the introduction of the REIT regime in the USA in the 1960s academic literature focused on the classical US-REIT model.⁹ Beside, there is little

⁵ The abbreviation “EU” in the context of this thesis refers to the European Union established with the “Treaty on European Union” (OJ 2010/C 83/01, vol. 53, 30 March 2010), Art. 1 I, thereby succeeding the (former) European Community (Art. 1 III), and is used for the EU as such as well as its Institutions synonymously.

⁶ The abbreviation “MS” or in it plural “MSs” refer to the Member States of the European Union (EU) only.

⁷ See i.e. EU REIT Coalition (2009), p. 16; Cornelisse (2006 Part 1 and 2).

⁸ See Falkner (2007).

⁹ Chan/Erickson/Wang (2003), Block (2002), Garrigan/Parsons (1997) and Imperiale (2002).

material and information available on EU REIT regimes. Literature and Papers on REITs generally focus on certain domestic regimes, usually in the language of the MS, so language hinders the use of the literature outside the certain country and comparative research is limited.¹⁰ Literature has not tended to a comparative approach, which might offer guidance on the choice of structure for Investors. The academic literature¹¹ comprises books on REITs in general, the EU and its law in general¹², the freedoms and single ECJ decisions with its official publications¹³ as well as official publications from the Commission¹⁴ supplemented with academic and popular papers by academics and consultants, mainly coming from the legal and tax court.

In Europeanization research:

*“... few case studies have focused on the relationship between the behaviour of smaller member states in the EU and the degree of their domestic adaptation to the external environment of the Union...”*¹⁵

This research contributes case studies of France, Spain and Bulgaria, thus expanding Europeanization research beyond the “usual suspects” of Germany, France and the UK.¹⁶

Comparative research, where extant, is limited to comparative illustrations where REIT regimes are illustrated by generally describing¹⁷ local MS¹⁸ regimes

¹⁰ See for instance with MSs like Bulgaria, Italy, Spain, Lithuania and Finland. For Benelux, UK, France and Germany some information is available in English language, but focuses on domestic regime.

¹¹ See i.e. Commission (1979); Chalmers (1994); Cerioni (1999); Cordewener (2002); EPRA (2005); Wunderlich (2005); Cornelisse (2006 Part 1 and 2); Jochum (2006); Mullaly (2007); Malherbe (2008); Evers (2010) et al.

¹² See i.e. Barnard (2004); Weatherill (2003); Schwarze (2007).

¹³ Source i.e. OJ.

¹⁴ Academic literature and papers provide sources on harmonisation activities in the EU with focus on direct taxes and company taxation, see i.e. Weiner (2002 – 2002b); Persoff (2004); OECD (Reports 1998, 2006, 2007, 2011); Council (2009); Commission (1997, 1999, 2002, 2003, 2006, 2007, 2009, 2011) et al.

¹⁵ See Hanf/Soetendorp (1998), p. 3.

¹⁶ See Vink/Graziano (2007), p. 17.

¹⁷ See i.e. EPRA (2004, 2009 and 2013b, Europe) and Ernst & Young (2005 Tax).

¹⁸ See i.e. Schäfer (2007), McGreal/Sotelo (2008) and Wijs (2010).

only¹⁹. This type of comparative illustrations on a country-by-country approach are found with EPRA' s "Global REIT Survey" issued since 2004²⁰ and the "Guide to REITs" by Simontacchi/Stoschek,²¹ both providing a basic grounding for this research though. Comparative illustrations on EU REIT regimes first increased with the establishment of REIT regimes in core MS to the EU such as in France, UK, Germany, Italy and Spain in particular.²² Even though limited still²³ literature comprise generally of the German, UK, Dutch, French,²⁴ and sometimes the Italian²⁵ as well as Spanish regimes only.²⁶ This type of advanced comparative illustrations of MS REIT regimes provide for a comparison by listing the features of MS REIT regimes by tables, thus, visualising its common criteria and differentiators. These comparisons are found in studies by Ernst & Young²⁷, PWC²⁸, CMS²⁹ and KPMG,³⁰ linked with the features of a classic US-REIT.³¹ However, these studies provide only for a descriptive illustration focusing on legal and economic details³², performance comparisons, platform effectiveness, capital allocation, transactions, financing³³

¹⁹ See i.e. for the US-REIT: Chan/Erickson/Wang (2003), Block (2002), Garrigan/Parsons (1997) and Imperiale (2002) all for the US REIT.

²⁰ See the EPRA' "Global REIT Survey", at: <http://www.epra.com/regulation-and-reporting/taxation/reit-survey/>. Today this Survey in its recent edition of 2013 includes all existing regimes introduced since its first publication except for one regime only what is the Hungarian SZIT (see EPRA (2013)).

²¹ See Simontacchi/Stoschek (2012), which together with EPRA Global REIT Survey (EPRA 2013), provide for the most extensive illustration of Global REIT regimes, but Simontacchi/Stoschek add some analysis "...to discern...some common patterns", however, not being "exhaustive" especially with respect to any common pattern towards a "common understanding" in between EU REIT regimes as used in this research thesis though (General Report, p. 4).

²² See EPRA (2013).

²³ See Funk (2008) limited to Netherlands and Belgium on the European level.

²⁴ See i.e. Wijs (2007) and (2007a), EU REIT Coalition (2009), p. 16; Leibold/Nass, (2008); Schmid, H. M. et al. (2007); Booth (2006); Suárez (2009).

²⁵ See i.e. EPRA (2007), p. 27.

²⁶ See Eichholtz/Kok (2007).

²⁷ See Ernst & Young (2010), p. 35 et seqq. spotlighting the 4 regimes in the US, UK, Australia and Japan only.

²⁸ See PWC (2013a) listing 20 of the some 34 REIT regimes globally including 9 of the 13 extant Regimes in the EU but missing Greece, Lithuania, Hungary and Ireland.

²⁹ See CMS (2008) provide for an overview of the key rules governing REITs in six European countries (UK, Netherlands, Italy, Belgium, France and Germany).

³⁰ See KPMG (2007) providing for a high level summary of inter alia six REIT regimes in Europe (UK, France, Belgium, Italy, Germany and the Netherlands).

³¹ The US-REIT model.

³² Criteria of focus are i.e. legal form, statutory capital requirements, shareholder limitations, stock listing, requirements as to qualifying assets, leverage ratio, sanctions, taxation and incentives for conversion (see i.e. Müller (2010), p. 3).

³³ See Ernst & Young (2012a). Study limited to the performance of six countries only which are Australia, France, Japan, Singapore UK and the US, Whereas, Ernst & Young (2013) focuses

and taxation of single REIT regimes.³⁴ Furthermore, books by McGreal/Sotelo³⁵ and Schäfer³⁶ provide a context for the development and success of REITs, thus, being only descriptive too.

Academic research comparing REIT regimes beyond a pure descriptive illustration is rare.³⁷ The first academic papers going beyond a simple listing of single regime features were published in 2007 from Maastricht University³⁸ followed in 2010 by the Technical University of Darmstadt.³⁹ However, none of the publications provide a full comparative analysis, or focus on criteria that investors may expect from a European REIT regime, or identify suspect regulations not compliant with EU law. Eichholtz/Kok (2007)⁴⁰ and Müller (2010)⁴¹ have identified a missing standardisation of regimes, Knebel/Schmidt (2008)⁴² found suspect rules on shareholder conditions. Hughes/Lewis (2008)⁴³ and Bone-Winkel et al. (2008) compared advantages of the REIT regimes within the EU's competition of vehicle structures.⁴⁴

Recent studies such as Cornelisse (2006 Part 1 and 2) and Müller (2010) have contributed to the understanding of MS REIT regimes, but have not touched upon the Europeanization of EU REIT regimes and the emergence of the EuroREIT. This thesis explores the impact of the EU on the (direct) tax treatment of the non-domestic shareholder in MS REIT regimes, and the

on economic details such as platform effectiveness, capital allocation, transactions, financing and emerging markets.

³⁴ See i.e. KPMG (2007); Funk (2008), regarding the Netherlands and Belgium; Leib/Nass (2008) and Schmid et al. (2007) regarding France, Germany and UK; Booth (2006) and Suarez (2009).

³⁵ See McGreal/Sotelo (2008).

³⁶ See Schäfer (2007).

³⁷ Examples for comparative analysis may be found i.e. with Nowak/Schreier/Simon (2005); Eichholtz/Kok (2007); Pfnür/ Müller (2010); Müller (2010). Pfnür/Müller and Müller are missing regimes such as Lithuania, Finland and Spain all of which were established already and shall have included for completeness in full though.

³⁸ See Eichholtz/Kok (2007).

³⁹ See Pfnür/Müller (2010).

⁴⁰ See Eichholtz/Kok (2007), p. 17 et seqq.

⁴¹ See Müller (2010), p. 44/45.

⁴² See Knebel/Schmidt (2008), p. 263 et seq.

⁴³ The comparative analysis by Hughes/Lewis (2008) comprise of a direct comparison of the regimes in France, Germany and UK as well as the US-REIT, even though partly only (see Hugh/Lewis (2008), p. 90 et seqq.).

⁴⁴ See Hughes/Lewis (2008), p.94 et seq. and Bone-Winkel et al. (2008), p. 46 et seqq.

likelihood of a mutually acceptable or harmonised EuroREIT model, an area not addressed by prior studies.

Comparative analyses generally focus on the corporate law side of REIT regimes, usually on single country regimes rather multi-regime comparisons. There is limited research on the tax regimes of different REITs, which is surprising considering that the taxation of a REIT is its cornerstone.⁴⁵ Domestic literature discusses the local domestic taxation of the REIT at company level, and tax treatment of shareholders, mostly in the form of papers and guidance by tax consultants.⁴⁶ Few publications pick up the tax treatment of non-domestic Investors either corporate or individual under domestic REIT regime.⁴⁷ The international consulting firms (Ernst & Young⁴⁸ or KPMG⁴⁹) and international Law Firms each come from their professional focus⁵⁰ and provide the first comparative survey of regulatory framework and the tax regime of REITs.⁵¹

The literature review thus shows a gap of knowledge on Europeanization effects on the local level, especially with respect to domestic direct tax regimes in MS REIT regimes. Only Cornelisse (2006)⁵² and Wijs (2014)⁵³ introduces suspect regulations in certain regimes limited to mainly tax issues, not issues of company laws and State aid. However, their contribution is high-level only without analysing neither the relevant case law nor the Treaty's⁵⁴ fundamental Freedoms⁵⁵ applicable. This thesis will, therefore, go beyond extant studies to set into context of the Treaty framework and ECJ case law, combining company

⁴⁵ See i.e. Stoschek/Dammann (2006).

⁴⁶ See i.e. Ernst & Young (2005); Cornelisse (2006, Part 1/2) and OECD (Report 2007); EPRA (2013b).

⁴⁷ See i.e. most recently Wijs (2014), p. Section 7.3/7.4.

⁴⁸ See i.e. Ernst & Young (2012a).

⁴⁹ See KPMG (2007).

⁵⁰ The focus usually is either taxation or legal focussed only (see i.e. CMS (2008); Loyens & Loeff in: Wijs (2007 and 2007a).

⁵¹ See Simontacchi/Stoschek (2012), General Report, p. 3.

⁵² See Cornelisse (2006 Part 1 and 2).

⁵³ See Wijs (2014).

⁵⁴ Articles in this thesis do all refer to the Treaty unless specifically otherwise indicated. "Treaty" in the context of this research refers to the consolidated Version of "The Treaty on the Functioning of the European Union", together with its Annexes and protocols thereto, as they result from the amendments introduced by the Treaty of Lisbon, which was signed on 13 December 2007 in Lisbon and which entered into force on 1 December 2009 (see OJ 2010/C 83/01, vol. 53, 30 March 2010).

⁵⁵ The fundamental freedoms referred to are the freedom of movement of goods (Art. 28), of services (Art. 56) and of capital (Art. 63) and the freedom of establishment (Art. 49).

law and (direct) tax law to conceptualise a compliant standardised EuroREIT. It seeks to identify common grounds for a European typed REIT concept, recognising MS Tax sovereignty while proposing the allocation of taxing rights and, thus, tax revenues. The research, therefore, focuses on the interaction of the laws of the EU and the MS and its impact especially to MS tax regimes and, thus, its REIT regimes.

3. Research aims

The aim of this research is to investigate the impact of the EU on direct taxation in the case of REITs, and whether EU policies in this area have led MS to adjust their REIT regimes. The research assesses the impact of the EU through its “hard” policies and relevant case law passed by the European Court of Justice (ECJ), and through “soft” policies are on the harmonisation of tax policies through greater transparency. While there has been a removal of barriers to the internal market by the EU⁵⁶ i.e. through the customs union and the establishment of competition rules, competence for direct tax policies remained with the MS, not subject to the list of shared competences with the MS. Each domestic REIT regime therefore follows national policies.

Nevertheless, the research will show whether in the absence of a fully harmonised internal market and more specifically without a harmonised and uniform company law all of the MS REIT regimes require essentially the same conditions and criteria for companies under its REIT regime. This will become visible in the area of taxation, which under the sovereignty of each of the MS’ harmonisation shall even less extant yet. However, from Literature⁵⁷ it appears that with regard to the tax treatment there seem to be common understanding in between MSs to tax income at source though. The taxation follows the principle of territoriality that is the levying of withholding tax in cross-border investment scenarios. In order to safeguard domestic tax revenue MS tax regimes are suspect of violating the fundamental freedoms guaranteed under the Treaty, i.e. the free movement of capital, thereby breaching one of the essential criteria of REITs that is, the tax transparency and taxation of income at shareholders level

⁵⁶ See Art. 3 I lit. a) and b).

⁵⁷ See i.e. Cornelisse (2006 Part 1 and 2), Müller (2010).

only. However, the ECJ made it clear that although direct taxation falls within the sole competence of the MS, they must nonetheless exercise that competence consistently with EU law⁵⁸, in accordance with the Treaty's principles.⁵⁹

The research will explore the idea of a harmonised EU-REIT (as requested by the five leading European real estate formations in the "EU REIT Coalition"), a compliant European REIT model, and whether harmonisation between MS REIT regimes may be possible. The harmonisation of REIT regimes in the EU towards a EuroREIT regime on EU level requires not only assistance from the EU and its institutions, but from MS' too. This holds true in particular for the harmonisation of (direct) taxes that are not in the competence of the EU rather is of MS' sovereignty. Therefore, harmonising activities on EU level shall be analysed to provide insight for future developments and the potential to assisting the emergence for a harmonised REIT at EU level.

Focus in this respect, however, will be towards "soft" policies in the area of direct taxes and potential concepts for the EuroREIT and its direct tax treatment. This is owed the fact that very little attention has been devoted in the European tax literature to the systematic analysis of (i) the compliance of the direct tax treatment provided by MS REIT regimes with EU law and of (ii) the analysis of solutions possible for taxing domestic originated income by foreign REITs without breaking through of the tax transparency of the REIT regime and safeguard MS tax revenue though. This lacking analysis is not only a likelihood of the complexity of the subject matter⁶⁰, rather a result of the lack of taking a holistic view not only on different areas of the law but linking it with areas of sovereignty, policy and culture, thus, with political sciences' European studies. Thus, analysis is not limited to calling for emergence of activities on OECD⁶¹, EU institutional level⁶² or to proposing for bilateral solutions⁶³, rather analysing ECJ's case law to the emergence for change to MS direct tax regimes, even

⁵⁸ See i.e. Case "Test Claimants".

⁵⁹ See i.e. Case "Avoir fiscal", para 107.

⁶⁰ See Somontacchi/Stoscheck (2012), General Report, p.3.

⁶¹ See i.e. OECD's Report (1998) and its project on Harmful Tax Practices (OECD (2007).

⁶² See i.e. Commissions' Code of Conduct (Commission (1998) and its call for increased tax co-ordination in between MSs (Commission (2006), p. 4.

⁶³ See i.e. Cornelisse's proposal to renegotiating DTTs (Cornelisse 2006, Part 2).

though not of competence by the Treaty to the EU and, more specifically, taking the efforts made already with the discussions about comprehensive methods for consolidated base of taxation to combining the results⁶⁴ with existing standards in the EU already like the Directive on the Automatic Exchange of Information (AEIO). Thus and thereby, closing the gap of potential loss of tax revenue that is creating a hindrance to MS to agree on a mutual acceptable concept for a common tax regime in cross-border situations to MS REIT regimes providing basis for a harmonised EU REIT regime, the EuroREIT.

The final question, therefore, shall be whether mechanisms identified already provide for solution to the tax treatment of income derived by foreign REITs or has built ground for change to occur. In this context the thesis discusses this concept of a consolidated tax base to allocate tax revenue between States in the case of REITs. Hereto, the findings from the comparative analysis and analysis of EU law will be conceptually linked with findings of the European Studies, with regard to movements in the EU towards the integration. In order to identify a process possible to forecast future development, the findings are set into context. Thus, activities by MSs and EU institutions shall be analysed providing basis towards harmonisation and, thus, the development of a European typed REIT regime and the development of the EuroREIT.

4. Research framework and methodology

There seem observation with early legal scholarship on the EU essentially being based on assumption that European Integration through law, seen through a lens of constitutionalism, is an exercise in “rendering the EU more state like” and that these assumptions persist in EU legal scholarship today. However, the legal academic community and those outside of it have questioned these assumptions for at least a decade. Moreover, whatever political scientists may think, EU legal scholarship is not concerned exclusively with doctrinal exposition, but with “how and why the law is more than the functional handmaiden of political actors”.⁶⁵ Thus, this thesis assumes that law plays a

⁶⁴ See for overview i.e. Weiner (2002) and Martinez-Serrano/Patterson (2003).

⁶⁵ See Hunt/Shaw (2009), p. 4.

significant role in the integration process according to de Burca.⁶⁶ In this context this thesis approaches the research question from the point of view provided by the ECJ in its Case “Kadi”, where the ECJ see EU law as if it were a domestic legal system and, thus, EU law is seen as a “separate and parallel regime”.⁶⁷ However, it shall not result into acknowledging EU law as a *sui generis* system, rather, to conceptualise the EU’s legal order as if it were that of a state, and to conduct legal analysis on the basis occurred in Case “Kadi” though. As legal scholarship on EU integration, this thesis, therefore, focuses on the integration of (EU) law (legal integration) in MSs and integration through (EU) law (the roles of law in the processes of political integration) taking account of EU “hard” and “soft” law.⁶⁸ Thus, the research is different to those of the social science scholarship of EU Studies.

Understanding the research as legal research, this thesis, is based on a legal positivist approach in that it accepts law as the observable phenomenon on legislation, custom, adjudication by courts and other legal institutions. This approach is used to systemise the relevant norms in MS REIT regimes, and to understand the relationships between different bodies of legal norms as well as to analysing the output of the ECJ and its coherence and accuracy of its application of sources of law i.e. EU law. In this context the research is neither about explaining change in the social nor political world, but about the exposition and analysis of legal doctrine i.e. EU’s legal “policy”, legislation and (ECJ) case law that is the EU’s legal system.

4.1 Research framework

Wincott⁶⁹ observed that “legal and political science analyses of European integration took place more or less in isolation from one another” the research takes account of political science i.e. European integration Studies even though focusing on legal doctrine i.e. European law though. Hereto, Walker⁷⁰ provide to connecting legal and political science in research of European integration

⁶⁶ See de Burca (2005).

⁶⁷ See Case “Kadi v Commission”, C-402/05, (2008), ECR-I6351.

⁶⁸ See Capeletti (1986),

⁶⁹ See Wincott (1995), p. 293.

⁷⁰ See Walker (2008).

though. Walker's differentiation of levels of interaction⁷¹ comprising "institutional incorporation", "system recognition" and "normative coordination"⁷² taking a legal approach to situations of integration. Institutional incorporation at the first level is represented where the host normative order (Host MS) makes general provision for the normative decisions of an external agency (EU) to be incorporated and treated as authoritative within the host normative order⁷³, such as MS's relationship with the EU. Furthermore at the level of "system recognition", providing for the second level of interaction, there is no general institutional mechanism, but there is recognition of another system formalised by the host on a systematic level, understood as intrinsic to the self-definition of the host system, such as incorporation of *jus cogens* norms.⁷⁴ The third level is that of "normative coordination" as a result of the application of codes of conduct voluntarily. This is not as strong as compulsory institutional incorporation, but is more than bilateral connections between legal orders only.⁷⁵

The Levels of interaction provided by Walker form a doctrinal legal point of view are used to bridge legal and political sciences. Analysing the impact of the EU's legal order on MS's legal systems and legislation involves identifying the legislative activity of EU institutions and its law relevant i.e. applicable Treaty provisions and ECJ case law. Walker's levels of interaction provide framework for the analysis of judgements from the ECJ, which might be operating at one of these levels. Using Walker's levels of interaction in the context of EU law provide mean to identify MS motivation and drivers for interaction with the EU and in between MSs, from a legal doctrinal point of view.

However, identifying the level of interaction legally gives clarity to the degree of connectedness between national and EU legal systems, but does not answer the question whether this is resulting from a process going forward leading to MS's legal systems becoming closer, rather from pure hierarchy of the legal

⁷¹ See Walker (2008), p. 373.

⁷² Walker's levels of incorporation comprise of total five levels. However, the fourth level of "environmental overlap" and "sympathetic consideration" will not be of focus to this thesis since these levels provide for a different kind of interaction and does not occur directly between legal systems, but is the overlap in the social and economic environments impacted by different legal orders (see Walker (2008), pp. 373 et seqq.).

⁷³ Ibid, p. 374.

⁷⁴ Ibid, p. 379.

⁷⁵ Ibid, p. 382.

systems involved. This question is not subject to legal research, but of political science. Hereto, Europeanization is used to providing answer and outlook to further development by explaining the process happening linking the facts to each other.

Europeanization is a concept that is used to explain a variety of changes within European politics and “can be a useful entry-point for greater understanding of important changes occurring in our politics and society”⁷⁶. With the process of Europeanization Walker’s levels of interaction are “translated” into the dimensions of Europeanization. Focused on the domain of Polity dimensions of Europeanization equal with Walker’s levels of interaction: institutional incorporation equals down-loading, “system recognition” assumes to comprise some degree of up-loading as well as “normative coordination” more likely represents case for cross-loading though.

Therefore, this thesis focuses on legal research on MS REIT regimes as well as the (legal) impact by the ECJ on them in order to understand how we got where we are with respect to certain criteria of MS REIT regimes. To answer the question whether today’s situation was *inter partes* resulting from a case decided by the ECJ only, rather being part of a process on-going the concept of Europeanization is applied to identifying examples of the process i.e. downloading, uploading and/or crossloading. To prevent misinterpretations in between legal and social sciences through the translation of the findings using Walkers conceptual (legal) approach, Europeanization forms the overarching theoretical framework of the research though, focussing upon the dimensions, mechanisms, and outcomes by which European processes and institutions affect domestic-level processes and institutions.

A number of academics recommend a focus on the domestic level to gauge the impact of the EU.⁷⁷ The bottom-up research design approach to Europeanization assesses whether the EU has impacted at domestic level, from the pre-existing situation.⁷⁸ In this context the (sub-)framework analyses the

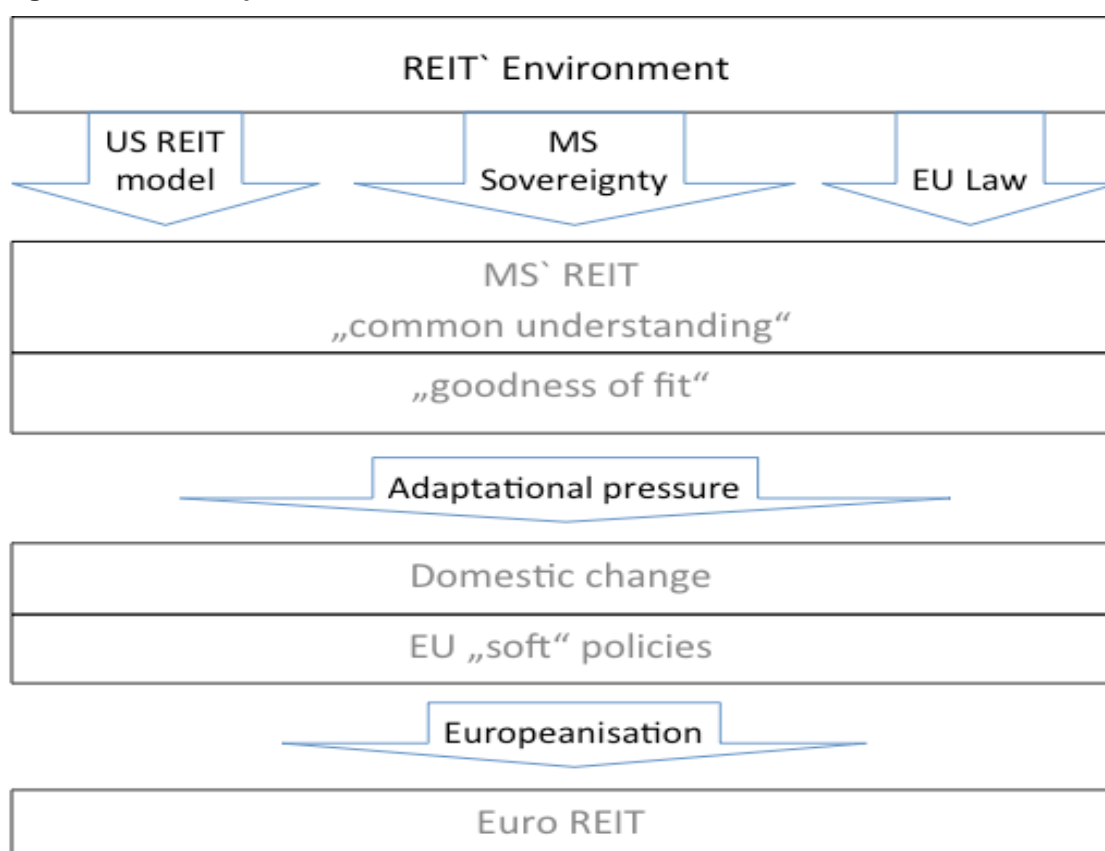
⁷⁶ See Featherstone (2003), p. 3.

⁷⁷ See i.e. Moumoutzis (2011), Radaelli/Pasquier (2007) and Exadaktylos/Radaelli (2009).

⁷⁸ See Rees/Quinn/Caunaughton (2009).

connectedness in between MS REIT regimes and between the national and the EU legal system. Hereto, the structured framework derives in part from analysis of the US-REIT model (legal requirements, operating activities, status, tax treatment and sanctions), with further criteria such as MS sovereignty in direct tax and the EU legal framework. The analysis follows the three-step approach to Europeanization, which will involve the discussion of “misfit”, testing the “common understanding” with relevant EU “hard” law, and from “goodness of fit” adaptational pressure applied to MS.

Figure I.4-1: Conceptual framework



Source: Original by W. Speckhahn

The legal research for applicable EU law include the Treaty and its provisions (“primary EU law”), and secondary sources (“secondary EU law”), representing “hard” policy. Research has been limited to the fundamental freedoms as a broad “benchmark”, with ECJ decisions providing for an “indirect” power in the

absence of a “direct” competence by the Commission.⁷⁹ This kind of indirect loss of sovereignty may be limited, as recognised in its ruling “Cassis de Dijon” that where a genuine interest is the subject of protection, national restrictive rules may remain compatible with the Treaty.⁸⁰ The concepts provided by settled case law may serve as a blueprint, and their principles applied to MS’ tax regimes in order to assess (non-)compliance with EU law. As a result, however, MSs face a high degree of institutional incorporation (Walker’s first level) that is by the EU though the ECJ downloading its “hard” law. The expanding legislative activity of EU institutions e.g. the ECJ incidentally affects MSs autonomous commitments towards the EU i.e. in direct tax. MS may, furthermore, be pressured for domestic change to its REIT regimes especially with regard to tax treatment too. However, the impact of EU “hard” policies may, thus, not only be one of incorporation only, but of recognition and coordination going forward, thus, inducing uploading and cross-loading too the process of Europeanization may be identified.

The research will focus on the idea of a harmonised EU-REIT as requested by the five leading European real estate formations in the “EU REIT Coalition”⁸¹, who have asked the Commission to introduce an EU-REIT regime to prevent national regimes not being in compliance with European law, disadvantage companies transferring to a tax haven.⁸² It will document the conditions and circumstances for the creation of a harmonised EuroREIT, thus, assessing the impact of the EU and the level of this change in the area of direct tax in the MS creating possibility for a harmonised EuroREIT. This will provide for MSs to adjust their domestic tax laws while recognising MS tax sovereignty as a basis of today’s political order.

⁷⁹ See i.e. ECJ Case C-208/00, “Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)” (Case “Überseering”), (2002), ECR I-09919 and Case C-212/97, “Centros Ltd v Erhvervs-og Selskabsstyrelsen” (Case “Centros”), (1999), ECR I-01459.

⁸⁰ See Case C-120/78, “Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein” (Case “Cassis de Dijon”), (1979), ECR I-00649.

⁸¹ The formations are the RICS, the European Landowners Association, EPRA, the European Group of Valuers Association and ULI.

⁸² Immobilien Zeitung (2007).

4.2 Europeanization

Europeanization as research concept is rather young having increased its popularity since the 1990s in academic research⁸³, there is neither unified understanding nor approach existing in academic literature of the European Studies.⁸⁴

While Europeanization is understood to mean different things to different authors and has been used in different ways, it is, however, now an acknowledged concept for political scientists to analyse the impact of the EU. Europeanization is understood as a process of “change affecting domestic institution, politics and public policy”. Domestic change can come about as “... MS adapt their processes, policies, and institutions to new practices, norms, rules and procedures that emanate from the emergence of a European system of governance...”.⁸⁵

But still, there seem little consensus to its definition varying in defining it as a process, output or impact⁸⁶ rendering it “... meaningless ... providing little common ground”⁸⁷, thus being “still in its infancy”⁸⁸ at an early stage of its conceptional development⁸⁹ and be viewed as a “disorderly field”⁹⁰ that “... remains ...(of)... theoretical interest ... (only)”⁹¹ though. Thus, Europeanization is a complex process that is first to be defined what Europeanization actually is⁹² since the term is used in different ways and for different purposes.⁹³

Consequently, Europeanization lacks an undisputed definition or in more positive words is of “... a somewhat loose definition...”⁹⁴. A major research

⁸³ See Vink/Graziano (2007), p. 3.

⁸⁴ See for overview e.g. Howell (2004a), p. 43 et seqq.

⁸⁵ See Börzel/Risse (2000), p. 6.

⁸⁶ See Jones/Clark (2010), pp. 12/13.

⁸⁷ See Radaelli (2000), p. 13.

⁸⁸ See Töller (2004), p. 1.

⁸⁹ See Bulmer/Lequesne (2005), 11.

⁹⁰ See Olson (2002), p. 922.

⁹¹ See Dyson (2002), p. 3.

⁹² See Buller/Gamble (2002), p. 4.

⁹³ See Bomberg/Peterson (2000).p. 3.

⁹⁴ See Featherstone/Kazamias (2001), p. 14.

project by the European University Institute on Europeanization (EUI)⁹⁵ provided definition of the term as referring to

“... the emergence and development at the European level of distinct structures of governance, that is, of political, legal and social institutions that formalise and routinise interactions among the actors, and of policy networks specialising in the creation of authoritative European rules.”⁹⁶

The definition by EUI leads to the understanding of Europeanization as primarily concerned with patterns of national adaptation to European Integration, thus the impact of the EU on its MS.⁹⁷ Dyson/Goetz (2002) resumed this understanding explaining that Europeanization is:

“... sometimes used narrowly to refer to implementation of EU legislation or more broadly to capture policy transfer and learning within the EU. It is sometimes used to identify the shift of national policy paradigms and instruments to the EU level. (Other)... times it is used in a narrower way to refer to its effects at the domestic level ... or in a more expansive way to include effects on discourse and identities as well as structures and policies at domestic level.”⁹⁸

Comparative analyses invoking the EU understand Europeanization as an independent variable to explain changes in national arenas.⁹⁹ Ladrech (1994) captured the EUI approach of “national adaptation” to setting in motion the discussion of Europeanization in this context shall be understood as an

⁹⁵ The European University Institute (EUI) was established in 1972 and is an international centre for doctorate and post-doctorate studies and research, situated in Florence.

⁹⁶ See Bartolini/Risse/Strath (1999), p. 2.

⁹⁷ See George (2001) and its reference to “... the effect of pressures from the EU ...”.

⁹⁸ See Dyson/Goetz (2002), p. 2.

⁹⁹ See Ladrech (2010), p. 12 and Hix/Goetz (2000), p. 23 who identified change in domestic systems or Europeanization as (dependent) variable.

“... incremental process reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organisational logic of national politics and policy making”.¹⁰⁰

This definition is marked as the starting point of the understanding of Europeanization, which in its most explicit form according to Howell is “conceptualized as the process of down-loading EU” associated with “top-down” procedures.¹⁰¹ Thus, it is the nature and extent of EU influence over policy-making processes in different states, that is the extent of Europeanization.¹⁰² In this context Risse et al. (2001) conceptualised Europeanization as

“... the emergence and the development at the level of distinct structures of governance, that is, of political, legal, and social institutions associated with political problem solving that formalizes interactions among the actors, and of policy networks specialising in the creation of authoritative European rules ...”.¹⁰³

The procedures are described such as “distinct modes of European Governance (that) have transformed aspects of domestic politics”¹⁰⁴ or “influence deriving from European politics impacting MS”¹⁰⁵ involving a response to the policies of the EU.¹⁰⁶ Though, Europeanization is not a process¹⁰⁷ itself. Rather, it is a process starting a development along certain steps on activities pre-defined leading to a specific result. The result according to Literature is always described as interaction being the outcome. Therefore, Europeanization shall be understood as a mechanism that is not a process itself but a description of what happens at European level between MS and MS towards the EU and its institutions as well as vice versa. The result may not be limited to integration¹⁰⁸,

¹⁰⁰ See Ladrech (1994), p. 69/70.

¹⁰¹ See Howell (2002), p. 1.

¹⁰² See Adshead (2002), p. 29.

¹⁰³ See Risse et al. (2002), p. 3.

¹⁰⁴ See Buller/Gamble (2002), p. 17.

¹⁰⁵ See Herriter (2001), p. 3.

¹⁰⁶ See Featherstone (2003), p. 3.

¹⁰⁷ Process in this context shall be defined as a deterministic Process where each individual status conditionally depends on the preceding one and is determined by this status.

¹⁰⁸ European integration has been defined as the shifting of the activities and loyalties of national actors towards a supranational centre (see Haas (1958)). It is a process whereby “... national actors forego the desire or ability to conduct policies independently and seek instead to

rather changing mind-sets, reality and perceptions. Hereto, the example is negative integration¹⁰⁹, which is not a result of a certain process rather pressure or omission. However, neither pressure nor omission as such involves activity by any means, rather, it “happens”, though, is not simply “out there”¹¹⁰. This emphasises what is known as the 'top-down approach' to Europeanization with change emanating from the impact of the EU onto the national policy and MSs are viewed as re-active towards changes in the EU.¹¹¹

However, a second dynamic that has been mostly neglected is the “interactive”¹¹² character of Europeanization. While “top-down” Europeanization still is a valid concept, there has become awareness of further dimensions to Europeanization though, recognising the interdependence¹¹³ of the involvement of “up-loading”¹¹⁴ by MS or “bottom-up”¹¹⁵ Europeanization by MSs projecting their domestic issues to EU level¹¹⁶ “... to “export” domestic policy models, ideas and details to the EU ...”,¹¹⁷ leading to a “... two way process”¹¹⁸, between the domestic and the EU levels, involving both top-down and bottom-up pressures ...”¹¹⁹. These processes are better to explain by different ways of looking at what Literature has developed in many different “faces” but referring all to the same.¹²⁰ In this sense Risse et al. (2001) have identified

make joint decision or delegate decision making power to new organs and are persuaded to shift their expectations and activities to this new centre” (see Lindberg (1963), p. 6/7). Part of the process of course, involves, according to the Preamble of the Treaty, “... lay the foundation of an ever closer union among the peoples of Europe ...”. In this context “integration” is understood as “positive integration” that is when EU obligations prescribe an institutional model to which domestic arrangements have to be adjusted with limited or none national discretion (see Knill/Lehmkuhl (1999). Example in this respect is seen with EU primary law i.e. Directives that are directly applicable in the MSs.

¹⁰⁹ Negative integration is where EU legislation alters the domestic rules of the game that is the extent to which European policies have altered the strategic position of domestic actors (see Knill/Lehmkuhl (1999), p. 3)). Example hereto is with the ECJ case law in direct tax where the ECJ gives pressure on the MSs to i.e. adjust their tax regimes, though, direct taxation not being part of delegated competence to the EU level rather is of the sovereignty of the MSs still.

¹¹⁰ See Bulmer/Burch (2000), p. 9.

¹¹¹ See for Europeanization as “down-loading” i.e. Börzel/Risse (2000), Bulmer/Gamble (2002), Goetz/Hix (2000) and George (2001).

¹¹² See Bomberg/Peterson (2000), p. 6; Howell (2003), p. 7.

¹¹³ See Featherstone/Kazamias (2001), p. 7/14.

¹¹⁴ See Börzel (2003), p. 3.

¹¹⁵ See Howell (2004), p. 4.

¹¹⁶ See Bomberg/Peterson (2000), p. 6.

¹¹⁷ See Bulmer/Burch (2001), p. 6.

¹¹⁸ See Bomberg/Peterson (2000), p. 2, 7, Börzel (2001), Bulmer/Burch (2001) and George (2001), p. 1, who, however, looked at the interrelation in the case of the EU and the UK only.

¹¹⁹ See Featherstone/Kazamias (2001), p. 6.

¹²⁰ See Olsen (2002).

Europeanization with the “emergence and development ... of structures... at the European level” (bottom-up) leading to “... the creation of authoritative rules ...” (top-down).¹²¹ Hereby, through the analysis of structures and policies and the part the EU plays in “... diffusion and construction ...”¹²² examples for Europeanization are found.¹²³ Thereby, the process show a “pattering” of action and omission at various levels of participants and interaction in between and with themselves by which finally a (national and institutional) pattering of decision making gives way to a European pattering.¹²⁴ Consequently, where Europeanization incorporates an interactive process in that it involves bottom-up and top-down procedures.¹²⁵

Furthermore, other definitions that take “more general concepts”¹²⁶ needs to be taken into account provided by Radaelli (2003), who describes Europeanization as consisting

“... of processes of a) construction, b) diffusion and c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'Ways of doing things' and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public choices.”¹²⁷

From this 'bottom-up' approach Europeanization occurs when MS begin to affect the policy of the EU in a given area. However, a more nuanced analysis posits that the institutional interaction of policy actors at the various levels of European governance leads to the re-definition of national, regional and other identities within a European context, where the multiple levels of governance in Europe

¹²¹ See Risse et al. (2001), p. 3.

¹²² See Radaelli (2000).

¹²³ See Howell (2003), p. 11.

¹²⁴ See Jones/Clark (2010), p. 11.

¹²⁵ See Howell (2002), p. 3 with reference to Börzel (2002), p. 193, and her emphasis to Europeanization to one that entails “the evolution of European institutions that impact on political processes and structures of the member states”.

¹²⁶ See Howell (2002), p. 3.

¹²⁷ See Radaelli for one of the broadest definitions of Europeanization in: Radaelli (2000), p. 4, (2003), p. 30.

are not seen as necessarily in opposition to one another. Rather, Europeanization is a circular¹²⁸ and interactive process¹²⁹ of

*“... complex interactive top-down and bottom-up process(es) in which domestic polities, politics and public policies are shaped by European Integration and in which domestic actors use European Integration to shape the domestic area.”*¹³⁰

In other words Europeanization cannot be distracted from either the domestic or the EU level of policy-making since it conditionally involves the interaction of the two¹³¹ and are needed to be considered in an understanding of the EU as process.¹³² Even though adaptational pressure for domestic structural change is at issue Europeanization does not come from a single European rule or policy, but from a combination of various Europeanization processes.¹³³

Additional perspective of Europeanization is the “horizontal approach”. Different to vertical mechanisms, which is about the definition of policies at EU level and its methabolisation at domestic level, thus, adaptational pressure. Whereas, horizontal mechanisms “... involve a different form of adjustment based on the market or patterns of socialisation”.¹³⁴ This approach takes into account the transfer of politics, policies and policy making between MS. The transfer is based on a form of “soft law”, therefore, it is not enforceable, but is based on “best practice” and mutual recognition.¹³⁵ Hence, the process of Europeanization includes “top-down” processes, as well as “bottom-up” and round-about processes¹³⁶ (“cross-loading”¹³⁷).¹³⁸ Therefore, Europeanization is being conceptualised

¹²⁸ See Goetz (2002), p. 4 who concluded, “Europeanisation is circular rather than unidirectional, and cyclical rather than on-off”.

¹²⁹ See Howell (2003), p. 7.

¹³⁰ See the recognition of the broadness of Europeanization by Dyson/Goetz (2003), p. 20.

¹³¹ See Featherstone/Kazamias (2001), p. 5/6.

¹³² See Howell (2003), p. 8.

¹³³ See Green Cowles/Risse (2001), p. 218.

¹³⁴ See Radaelli (2003), p. 41.

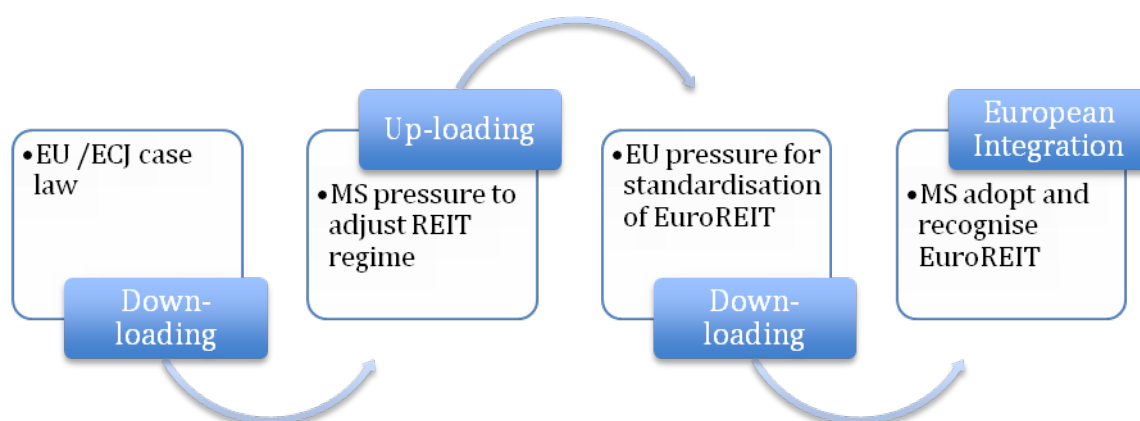
¹³⁵ This interaction in between MSs is what Bomberg/Peterson (2000) have in mind with policy transfer driven by MSs to sharing common concern to solve policy problems (see Bomberg/Peterson (2000), p. 13).

¹³⁶ See Rees/Quinn/Connaughton (2009), p.16.

¹³⁷ See Howell (2004), pp. 46 et seqq.

“... as a process that involves not only hierarchical (top-down) processes, but also bottom-up processes, whereby domestic actors seek to upload norms to the European arena, and horizontal processes, whereby norms can be diffused across MS using the EU as a facilitator of norm and policy diffusion.”¹³⁹

Figure I.4-2: Interaction between MS and the EU



Source: Original by W. Speckhahn

Thus, Europeanization is about the practices in “being and becoming European”, creating the conditions defining Europe and, thus, an approach of the study of developments of contemporary Europe.¹⁴⁰ In this context Europeanization can provide a point of reference for domestic actors who not merely react to European impulses but anticipate such impulses by inducing bottom-up processes changing the European level or by “using” or “endogenising” Europe in domestic politics independent to specific pressures from Brussels. In other words, Europeanization includes the domestic political domain as well as the impact of EU activities and an interactive nature, thus is a “complex process”.¹⁴¹ The interaction between the actors and levels is a perpetual process going forward and is illustrated by Figure I.3-1.

¹³⁸ See Howell (2004a), p. 5 et seqq. (7).

¹³⁹ See Mulcahy (2009), p. 23.

¹⁴⁰ See Harmsen/Wilson (2000), p. 24.

¹⁴¹ See Bomberg/Peterson (2000), p. 7.

However, the interaction is not limited to vertical activities, either top-down or bottom-up, rather comprise of horizontal activities to cross-loading politics, politics and public policies. The interaction i.e. in between MS occurs in both vertical levels either by sharing practices to transform of what is down-loaded by the EU, i.e. through ECJ case law indirectly influencing domestic direct tax laws of the MS, or by building alliances in up-loading politics, politics and policies to the EU or via the EU and its Institutions (down) to other MS, i.e. in the case to pressuring MS to agree to the automatic exchange of information in direct tax.¹⁴²

At the same time, beside vertical mechanisms, there are horizontal mechanisms in place, i.e. before u-loading policies et al. MS may interact to aligning interests or bench-marking themselves to managing their expectations before being up-loaded to representing MS's position to the subject topic at issue. In fact, the mechanisms are interrelated building a "triangle" of mechanisms driving Europeanization.

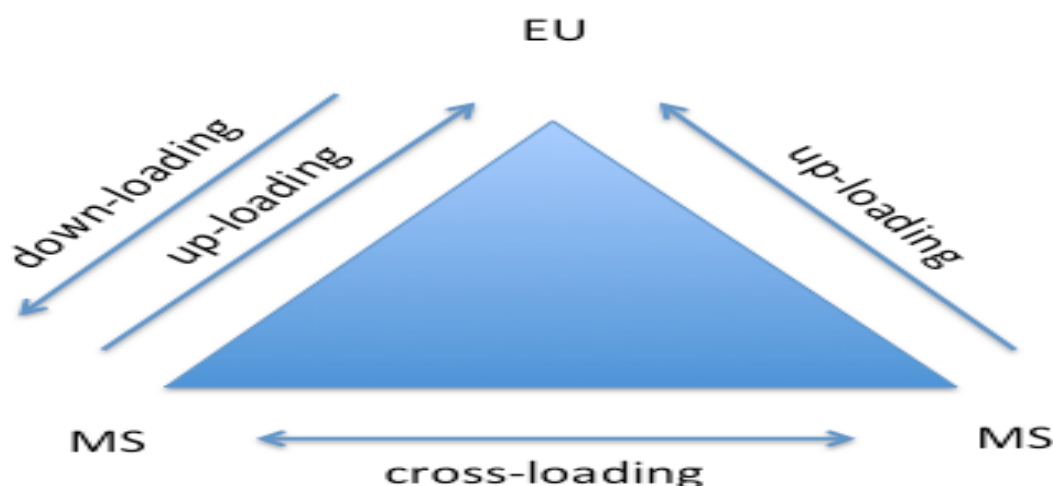
Obviously, Europeanization concerns a complex interrelationship between processes of change taking place at the EU and national levels.¹⁴³ In this triangular relationship Europeanization appears on different levels whether it is down-loading, up-loading or cross-loading and it is subject to the certain topic at issue whether the certain process is accounted for one of the levels relevant. However, processes may not account for just a single "cause" since every reaction is caused by an action, but the action may be triggered by another

¹⁴² Further to the agreement reached on 14 May 2013 on the mandate to improve the EU's agreements with Switzerland, Liechtenstein, Monaco, Andorra and San Marino, and the consensus on the scope of the revised Directive, the European Council of 22 May 2013 called for the adoption of the revised Directive before the end of 2013. See i.e. the case of Luxembourg having been pressured by the EU strongly assisted and lobbied by the bigger economies such as the MSs of Germany and France (see Proposal 2013/0188 for a Council directive amending Directive 2011/16/EU as regards mandatory exchange of information in the field of taxation). The scope of automatic exchange of information within MSs under the Proposal of directive will be the same as under US FATCA (FATCA - Foreign Account Tax Compliance Act. US tax rules designed for the US to collect information on US taxpayers, their income and their assets, from non-US financial institutions, directly or through other tax authorities) and will follow the same schedule, i.e., effective as from 1 January 2015. As a result, the availability of information to report should not come as an issue for financial institutions because of this Proposal of directive. Further to the implementation of the proposed directive together with the Directive, almost any kind of income received by a EU resident would be subject to automatic exchange of information. Taxable income as from financial year 2014 would thus be concerned by such automatic exchange of information if the proposed directive is adopted by the EU Parliament and the EU Council (see i.e. Ernst & Young (2013a)).

¹⁴³ See Olsen (1996).

effect of impact itself that “caused” the action. Therefore, even MS interact in between themselves this activity may be caused by activities on-going on EU level. Furthermore, activities may have up-loaded from MS level and policies have been taken up at the EU level and downloaded back and so on and so forth. Especially in such cases of interaction in a series of activities over a longer period of time, which is usually the case for decision-making in the EU, the identification of the “causal effect” is limited. Thus, Europeanization is built of all levels of interaction and comprise of a “... thicker understanding and perspectives of processes at work in the EU”.¹⁴⁴

Figure I.4-3: Dimensions of Interrelation



Source: Adapted from Howell (2004a)¹⁴⁵

Obviously, the level playing field for the MS is framed by the Treaty and competences transferred to the EU as well as sovereignty stayed with the MS. However, compliance with the Treaty’s fundamental freedoms (primary EU law) and pressure provided with ECJ case law (secondary EU law) on MS to adjusting domestic rules and regulations, thus, affecting MS’s sovereignty. Nevertheless, in order to identify the “impact” sought after this research will not prejudge the role of the EU as the source of change domestically, rather focus on the domestic level being the crucial aspect of “... identifying the effects and pressures stimulated by the diffusion of European integration ...”¹⁴⁶ and, thus,

¹⁴⁴ See Dyson (2000).

¹⁴⁵ See Howell (2004a), p. 49.

¹⁴⁶ See Rees/Quinn/Connaughton (2009), p.16.

assessing the impact of the EU.¹⁴⁷ In this context the level (top-down, bottom-up or cross-loading) for causal effect shall be assisted by the identification of the qualitative aspect of the effect too. Thus, it is important not only to assess whether the EU has mattered (“caused”), but the degree to which it has mattered (“quality”), since the potential impact of the EU is dependent on the level of adaptational pressure exerted on the domestic level as well as the extent to which mediating factors can affect this level of change.

Hereto, Risse et al. (2001) provided for explanation based on the “goodness of fit” test.¹⁴⁸ The test is based on the assumption that adaptational pressure conditionally comprise of an underlying situation differing significantly to the situation at issue, thus, MS feel the need for change and pressure for adaptation emerges.¹⁴⁹ Therefore, at the first level of the test question has to made whether a certain EU initiative provide a challenge for domestic actors and institutions with regard to a situation that is in “misfit” with “formal or informal norms, rules, regulations, processes, and practices”.¹⁵⁰ Based on the existence of “misfit” it shall be assessed the level of the “goodness of fit”, which is the assessment associated with the level of adaptational pressure applied on the domestic level.¹⁵¹ Though, the level of pressure to adapt an initiative determines the intensity of change necessary, thus, it constitutes a necessary condition for domestic change.¹⁵² In the third-step the “goodness of fit” test is about the impact on domestic level focusing on the mediating factors explaining the degree of change at the domestic level shaping the outcome of Europeanization.¹⁵³ Therefore, Börzel/Risse (2003)¹⁵⁴ argue that “misfit”

“... is only the necessary condition for domestic change. Whether misfits produce a substantial effect at the domestic level depends on the presence of various factors facilitating adaptation and serving as catalysts for domestic change. Only if and when these intervening

¹⁴⁷ See Börzel/Risse (2012), p. 6.

¹⁴⁸ See Risse et al. (2001), p. 6 et seqq.

¹⁴⁹ See Börzel (1999) and (2005), p. 50.

¹⁵⁰ See Risse (2001), *ibid.*

¹⁵¹ *Ibid.*

¹⁵² See Börzel/Risse (2012), p. 6.

¹⁵³ See Risse et al. (2001), p. 6.

¹⁵⁴ See Börzel/Risse (2003), p. 63.

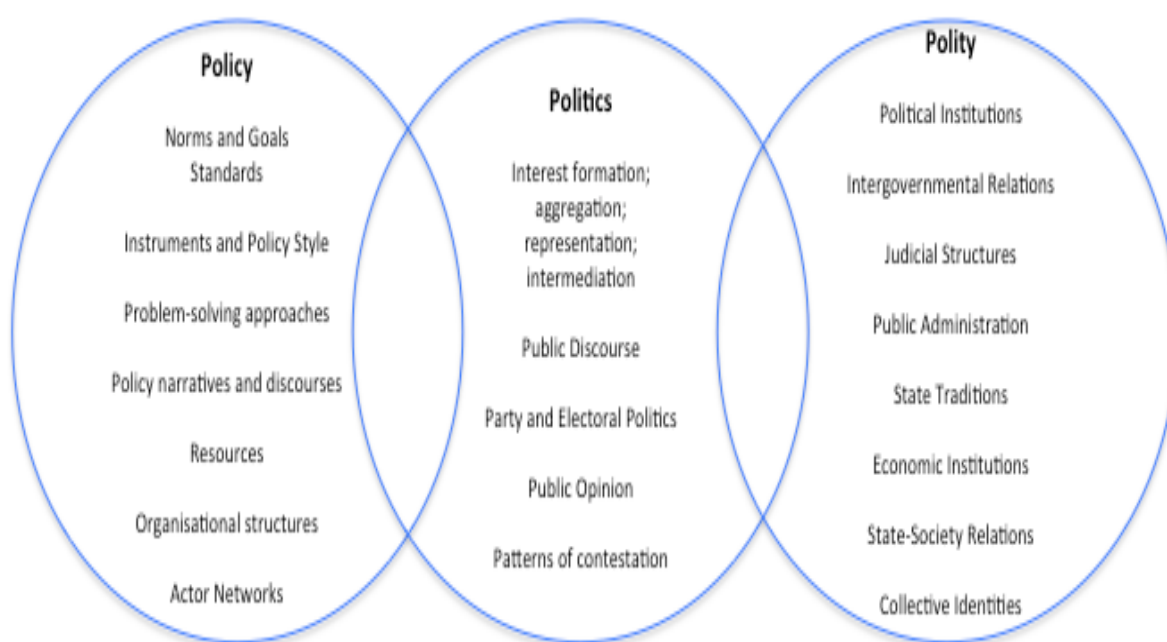
factors are present can we expect a transformation of policies, politics, or polities in the member states.”

Mediating factors in this context can be “... cultural factors and state tradition ... (which are) ... important in shaping the way in which European legislation is received at the national level”.¹⁵⁵ In addition to the identification of the factors for the process of change, the areas of impact at the domestic level are important. According to Radaelli (2012) the EU can impact at domestic level through a broad range of phenomena,

*“... the process of Europeanisation may take place via the constraining power of legislation, ideational and learning processes of socialisation and convergence around shared paradigms of public policy, the re-calibration of identities and material resources ...”.*¹⁵⁶

Therefore, a number of domestic domains are impacted by EU initiatives, which have already been categorised into three domains, which are policy, politics and polity.¹⁵⁷

Figure I.4-4: The three domains of change



¹⁵⁵ See Rees/Connaughton (2009), p. 19.

¹⁵⁶ See Radaelli (2012), p. 2.

¹⁵⁷ See i.e. Börzel/Risse (2003), p. 63.

Source: Börzel/Risse (2003)

Finally, Europeanization shall be measured with regard to its process that is outlined as the “outcomes of domestic change”.¹⁵⁸ The degrees of domestic change are inertia, retrenchment, absorption, accommodation and transformation.¹⁵⁹ Inertia occurs when there is an absence of change due to resistance of the MS rather as a result of “goodness of fit”.¹⁶⁰ However, resistance can also be sustained for a period of time particularly where EU law is concerned.¹⁶¹ Retrenchment “involves the empowering of a coalition of domestic actors who oppose EU-inspired changes”¹⁶² and can even serve to increase the “misfit” between national and EU requirements.¹⁶³ Absorption refers to a level of low change, as MS are unable to “incorporate European requirements into their domestic institutions and policies without substantial modifications of existing structures and the logic of political behaviour”.¹⁶⁴ Accommodation represents a moderate level of change, as MS do not have to change core domestic features but rather adapt these existing domestic features to meet EU requirements.¹⁶⁵ Finally, transformation represents the strongest level of change, which requires the MS to conduct a major adjustment of domestic features, “MS replace existing policies, processes, and institutions by new, substantially different ones, or alter existing ones to the extent that their core features and/or underlying collective understandings are fundamentally changed”.¹⁶⁶

Though, having conceptualised Europeanization there seem to be overlapping if not contradiction with European integration. It seems difficult to distinguish ~~that~~ these concepts, thus, need to be clarified with regard to its differences and similarities.¹⁶⁷ Olson (2002) concluded that European integration and Europeanization perceives very little difference if not could be seen identical

¹⁵⁸ See Börzel (2005), p. 58.

¹⁵⁹ See Ibid and Featherstone/Radaelli (2003), pp. 37 et seqq.

¹⁶⁰ See Börzel (2005), p. 58.

¹⁶¹ See Ibid and Quaglia et al. (2007).

¹⁶² See Quaglia (2007).

¹⁶³ See Börzel (2005), p. 58.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ See Howell (2002), p. 6, (2003), p. 15 et seqq., (2004a), p. 41 et seqq.

since the EU was a political project and it is the way that European integration and Europeanization could be seen as one and the same.¹⁶⁸ Schmidt (2001) on the other hand distinguishes Europeanization as the process having impact on domestic structures, whereas European Integration represents construction and formulation of policy at EU level.¹⁶⁹ Thus, developed governance institutions at the supranational level indicate European integration. However, this understanding was already used by Risse (2001) to conceptualise Europeanization too with outlining the "... emergence and development at the European level of distinct structures of governance ...".¹⁷⁰ But these developments do not come out of nowhere, rather are result of MSs (inter-)action with the EU level though. This activity is what is conceptualised as Europeanization in terms of uploading and downloading and crossloading though.

Thus, there is not an overlap, but interaction in between European integration in it is the emergence and development of EU policy and Europeanization in it is the retroactive effect on the MSs.¹⁷¹ Howell (2002/2004a) distinguishes in between integrative legislation provided by the EU and a diverse domestic interpretation brought about through Europeanization, but argues for a "continual interaction" between the two.¹⁷² Therefore, "both the emergence and development of EU institutions and the formulation of rules at the EU level may be understood as aspects of European integration".¹⁷³ Those aspects comprise of vertical impulses i.e. from top-down and bottom-up, whereas horizontal impulses i.e. through coordination in between MSs lack of clear direction though. With its vertical impulses, however, the EU impacts hierarchal (vertical=top-down) the politics of MSs. Hereto, there are two ways of impacting in that instruments used are positive and negative integration. With positive integration the EU develops a distinct European model of policy. Example to this is the Monetary Union "in which a fully fledged institutional model of monetary

¹⁶⁸ See Olsen (2002).

¹⁶⁹ See Schmidt (2001).

¹⁷⁰ See above, p. (17).

¹⁷¹ See Radaelli (2003), p. 29.

¹⁷² See Howell (2003), p. 19/20.

¹⁷³ See Howell (2004b), p. 8.

policy is being diffused to the countries of the Euro-zone”.¹⁷⁴ Policy making though positive integration forces MSs to implement and, in case, adjust their national rules. Whereas, negative integration comprise hierarchical influences on MSs without, however, stipulating a certain institutional model of policy. This is relevant e.g. in establishing the Common Market (market-making) through the reduction of barriers, rather actively creating the market (market-shaping). Instead, the EU is working towards “mutual recognition” of national rules i.e. through the ECJ with its Case “Cassis-de-Dijon”.¹⁷⁵ Though, negative integration incorporates politics by the EU in order to fuel “harmonisation” of national rules. Thereby, Europe touches upon constitutive norms such as state sovereignty¹⁷⁶, thus, the EU is indirectly setting impulses to seek for competences. Thus, negative integration may undermine state sovereignty leading to a loss of national competence though. However, this is done without the setting of a certain institutional model of policy, rather excluding alternatives for action for national governments to safeguard the common market. In this, with its vertical instruments the EU acts from a top-down perspective impacting MSs through “hard” EU law. This is complemented with horizontal activities in fields of politics without expressed competence by the EU i.e. direct tax policies. Here, the EU is to stimulate and motivate MSs for inter-governmental cooperation only without the possibility to using hierarchical influence.

However, it appears from horizontal impulses that MSs are involved and, thus, actively taking part in the processes. Starting from horizontal coordination MSs may up-load their ideas to the EU level where these ideas may be downloaded through means of positive or negative integration. With this interaction, however, it is difficult to distinguish between Europeanization and European integration and evidence for causation.¹⁷⁷ Thus, a clear analytical separation of cause and effect of European policy begs a “chicken and egg” question.¹⁷⁸ Furthermore, the conceptualisation of Europeanization in that it comprise top-down and bottom-up processes at the same time, there is no clear view of what is the

¹⁷⁴ See Radaelli (2000), p. 16.

¹⁷⁵ See Case “Cassis de Dijon”.

¹⁷⁶ See Risse (2001).

¹⁷⁷ See Bulmer/Burch (2001), p. 81.

¹⁷⁸ See Featherstone (2003), p. 19.

dependent and what is the independent variable that the “chicken and egg” question “Who is affecting whom?” can even be answered less.

But it becomes clear MSs are not in a passive position only though.¹⁷⁹ Rather, MSs are “takers” in that receiving policies from the EU level and “shapers” in that they involve in designing European policy.¹⁸⁰ Though, they are actively engaged influencing European policies, but assisting the implementation of policies at their national levels as well. Therefore, Europeanization is a two way process between the domestic and the EU levels, involving both top-down and bottom-up pressure.¹⁸¹ Consequently, Europeanization may be defined as the source of change through MS uploading to the EU level and European integration representing the outcome as well as looking to European integration as the source of change and Europeanization the outcome of change on MS governmental, legal and regulatory structures.¹⁸² In other words, European integration comprises of the environment on which Europeanization impacts or from which it emanates.¹⁸³

Figure I.4-5: The relationship between the EU and its MS: Bottom-up and Top-down

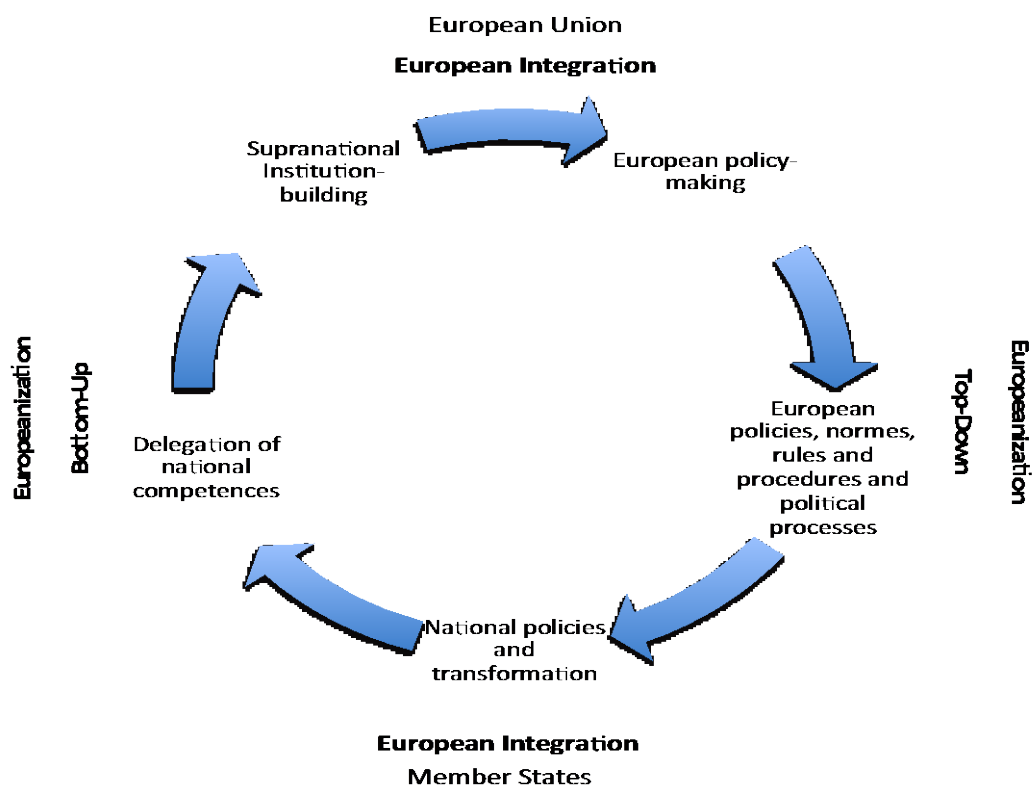
¹⁷⁹ See Radaelli (2003) who assumes a passive role by MSs within its conceptualisation of Europeanization.

¹⁸⁰ See Börzel (2003).

¹⁸¹ See Featherstone/Kazamias (2001), p. 6.

¹⁸² See Schmidt (2001), p. 3 and Howell (2003), pp. 20.

¹⁸³ See Howell (2002), p. 6.



Source: Adapted from Börzel (2003), p. 2

However, as discussed above there is always the question where a process has started and come to an end, rather, accepting the “process” being an on-going development. Therefore, this thesis follows the concept of Integration being a “teleological view of the process”¹⁸⁴, thus, the result of a process.¹⁸⁵ Whereas, Europeanization goes beyond representing the process, which is the process of change itself recognising the interaction in between various levels of European politics and societies.¹⁸⁶ Though, conceptually there are differences between Europeanization and European integration there is also a process between the two that is seamless.¹⁸⁷ Therefore, European Integration is concerned with the construction of a European “centre” or a European “whole” (only)¹⁸⁸, thus, comprises of the environment on which Europeanization impacts.¹⁸⁹ It is to conclude that both European integration and Europeanization share similarities, though, there are differences still. Similarities, however, seem to provide

¹⁸⁴ See Harmson/Wilson (2000), p. 19.

¹⁸⁵ See Howell (2004a), p. 10 for Europeanization as meso theory in terms of “process”.

¹⁸⁶ See Howell (2003), p. 20.

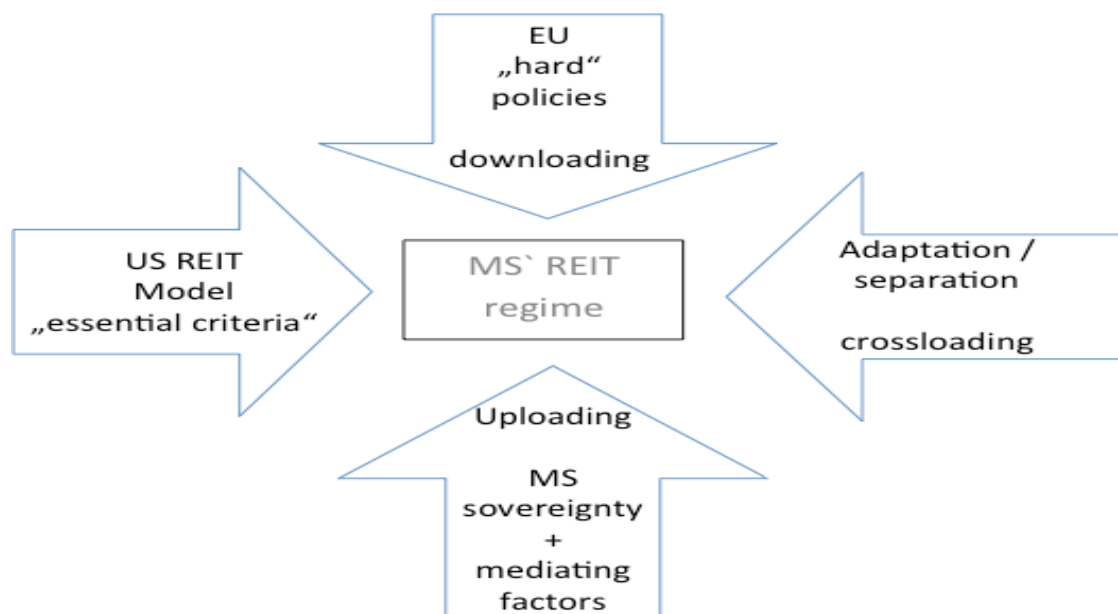
¹⁸⁷ See Howell (2002), p. 6.

¹⁸⁸ See Howell (2003), p. 20.

¹⁸⁹ See Howell (2003), p. 21, (2004a), p. 9.

tendency of being predominant with a view to the causal mechanisms of integration and Europeanization identified though.¹⁹⁰

Figure I.4-6: Interaction of aspects of the “process” of Europeanization



Source: Original by W. Speckhahn

In this European integration continues to deepen despite major crises and attempts to take back sovereignty. A growing number of MSs are reacting to a more constraining EU by negotiating opt-outs. Examples are prominent i.e. with the most controversial cases of differentiated integration: the British and Danish opt-outs from Economic and Monetary Union and European policies on borders, asylum, migration, internal security and justice. However, opting-out or in other words preventing from integration of national policies, thus safeguarding national sovereignty prevent national governments to influence even politically sensitive areas covered by their opt-outs. The taking place of European integration through everyday negotiations transforms national interests into European ideals. It is usually assumed that MSs opt out to preserve sovereignty, but national opt-outs may actually reinforce the integration process.¹⁹¹

The preceding discussion points out that Europeanization lacks a paradigmatic consistency, thus, is not a rigorously specified analytical concept. However, it

¹⁹⁰ See Eising (2003), p. 400.

¹⁹¹ See Adler-Nissen (2015).

provides a focal point for genuinely interdisciplinary dialogues concerned with the multidimensional processes of change occurring in contemporary Europe.¹⁹² Therefore, Europeanization as a process is explicitly about the transformation of local, regional, national and international structures and relations, that is, about the practices involved in “being and becoming more European”, thus, an approach to the study of developments in contemporary Europe.¹⁹³ Even though this development, thus Europeanization, becomes most visible through vertical mechanisms such as down-loading by enabling to clearly identify “cause” and “effect”, the concept lacks to fully explain the interactions at work in the formulation and diffusion of EU policy.¹⁹⁴ Europeanization in this context shall, therefore, understand as the process explaining the relationship and interaction of MS and EU institutions producing change on domestic level and at the level of the EU and how this is processed.¹⁹⁵ This thesis, therefore, includes an analysis of the interaction of the aspects of the “process”¹⁹⁶ in vertical (to-down, bottom-up and policy transfer) and horizontal (cross-loading and (policy) transfer) terms as well as identifying change at EU and domestic level and its “interwoven relationships” and aspects of fit and misfit.

4.3 Research methodology

The research methodology is mixed, comprising legal and sociological methods.¹⁹⁷ As a “common understanding” between MS is sought in order to test compliance with EU law¹⁹⁸ the research followed a comparative legal and jurisprudential approach. Other social science methodologies (as discussed recently. by Howell)¹⁹⁹ offered valuable insights, but the research approach has

¹⁹² See Harmson/Wilson (2000), p. 20.

¹⁹³ See Harmson/Wilson (2000), p. 24.

¹⁹⁴ See Howell (2004a), p. 11. While, domestic change may follow from globalisation in general, the research traces specific domestic changes on MS level to developments emanating from the policy-making output of the EU institutions and its influence on MS policies and behaviour. Europeanization is, therefore, understood as the change within a MS whose motivating logic is tied i.e. to a EU policy. To this point, “... the concept of Europeanisation offers a more accurate sense of, explanation, for aspects of domestic change than globalisation...” (see Ladrech (2010), p. 6).

¹⁹⁵ See Radaelli (2006), p. 59 with reference to Giuliani (2003), p. 152, and the idea of Europeanization as “*explanandum*”.

¹⁹⁶ See Figure I.4-6.

¹⁹⁷ As set out in Figure I.4.7.

¹⁹⁸ In “filling the gap of limited research on the existence of congruencies” as stated by Pfnür/Müller (2010).

¹⁹⁹ See Howell (2013).

concentrated upon legal and jurisprudential methods, drawing upon ECJ case law analysis and country case studies followed a comparative analytical format.

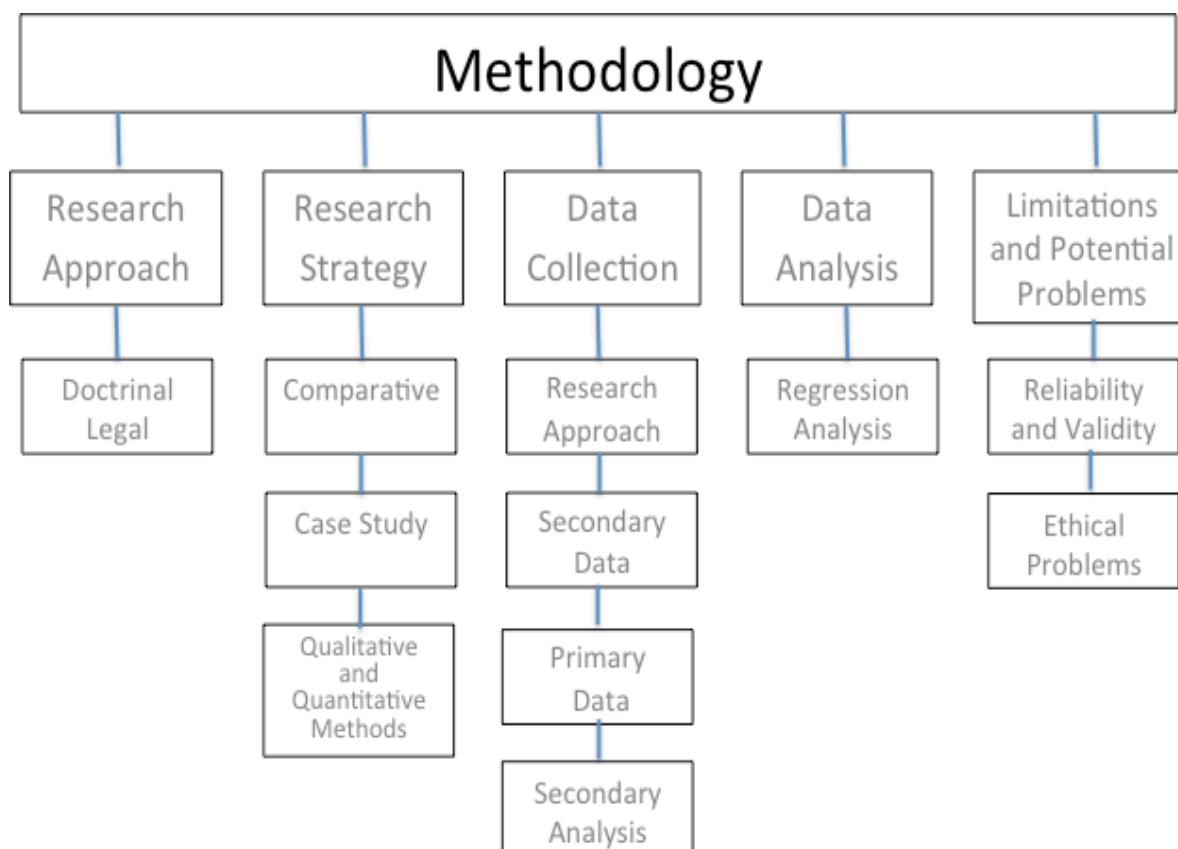
The use of grounded theory for part of the research was considered at an early stage in the research project. Grounded theory develops categories, which are derived from the data and, based upon their perceived relative importance, embeds the categories within more general and broader theories.²⁰⁰ In this case the researcher's previous professional experience with REITS helped to formulate the conceptual framework, with grounded theory applied to a limited extent in the initial identification of the country case study jurisdictions, and drawing upon doctrinal legal research to generate a comparative framework of analysis.

Comparative law research is undertaken to identify common themes across different legal systems. This thesis compares MS REIT regimes from a legal perspective with the intention first to test whether the legal regime of REITs and its criteria are true across different systems, and, secondly to determine whether the understanding of REITS ("common understanding") reflects a consistent manner of dealing with behaviour across MSs, or represents a local idiosyncrasy.²⁰¹ Thereby, the comparative methodology is aiding the harmonisation of laws.

Figure I.4-7: Research Methodology

²⁰⁰ See Silverman (1993); Howell (2013a).

²⁰¹ See Cryer et al. (2011), p. 28.



Source: Adapted from Biggam (2011)²⁰²

Thus, the research begins by determining the existing law in MSs for its REIT regimes. Following this doctrinal research in a particular area of REITs it is followed by a consideration of the problems currently affecting the law and the policy underpinning the existing law, highlighting, the flaws in such policy, which is the non-compliance of REIT regimes with EU law. This in turn lead the researcher to propose changes to the law (law reform) focusing to the reform tax laws introducing a harmonised concept for taxation. The research is based on comparative research though. As such, to mitigating concerns towards comparative studies and its difficulties of comparing “like for like”, the research start to define a REIT using the US-model REIT regime. From here, framework of criteria is drawn comprising the basis for comparative research, which is limited in scope to REIT regimes in EU MSs though.

Table I.4-1: Framework of REIT criteria

REIT criteria
Legal requirements

²⁰² See Biggam (2011).

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE

Challenging MSs tax regimes

Legal form
Share Capital
Registered Seat
Listing
Stock Exchange
Shareholder conditions
Operating activities
Acquisition and Sales
Leasing
Ancillary Services
Development
Status
Asset Test
Income Test
Gearing Test
Distribution Test
Tax treatment (REIT level)
Income Tax
Capital Gains
Withholding Tax
Sanctions
Penalty
Loss of status

Source: Original by W. Speckhahn

From the definition of the criteria that are defining a REIT regime, extant regimes in EU MSs are identified and “REIT-like” regimes²⁰³ excluded. Using the framework established the comparative analysis of REIT regimes in MSs it was assumed that MSs provide different legal and cultural environments likely leading to a range of conceptual approaches within each of the criteria of the framework, rather the identification of a common single understanding of their REIT regimes.

Thus, in order to manage the range of concepts, but having a single benchmark for the comparative analysis to identify a “common understanding” in between the regimes and, thereafter, analysing its compliance with EU law, the analysis makes use of the mathematical concept of “the least common denominator”. Herewith, the understanding extant to date in MSs is reduced to extracting a common model for a REIT, thus, the identification of a “common understanding”

²⁰³ “REIT-like” regimes differ to (true) REIT regimes in non-compliance with essential criteria for REITs i.e. Legal requirements (Listing), Status (Distribution Test) and Tax treatment (see Framework of REIT criteria, Table I.4.8, and Chapter II, Sec. 2 below for the definition of a REIT).

in between MSs and its REIT regimes. In order to identify the common understandings compliancy with EU law the research is subject to evaluative research in its second part focusing on the tax treatment of REITs in the EU. Since the analysis of direct tax rules depends on the legal quality, thus the legal form, of an entity, the research in this part includes the regime legal requirements too. The research for this part begins by collecting all relevant primary law including relevant case law in order to demonstrate how the particular law is not working. Hereto, the identification and definition of relevant primary law explores issues of competence in direct tax between the EU and MS sovereignty. This aspect of the research is draws upon comparative research in legal systems and doctrinal legal focus. Rather than following a political science and government approach, the research analyses ECJ cases relevant for MS REIT regimes, including both tax and company law related cases²⁰⁴, the benchmark for analysis being the “common understanding” model of the EU REIT, identifying potential discrepancies and non-compliance with EU “hard” law.

Following the doctrinal part, the research seeks to identify the impact of the EU, thus, the outcome of EU law analysed in the case of REITs in the EU. The demonstration is of the law not working involving case studies are seen as complementary for the research strategy to answer the research questions and provide for in depth analysis of MS regimes.²⁰⁵ Herewith, the REIT regimes of the MS comprising the case study are benchmarked with the “common understanding” as well as to identify in detail deviations from EU law relevant, thus, potential non-compliance. A case study, therefore, offers opportunity to study a particular subject not limited to pre-defined criteria, but involving environmental, cultural and other factors. Although there is critique for the case study method because of its inability sometimes to provide reliable and general

²⁰⁴ There were only five such decisions before 1990, but around 40 in the 1990s and more than 35 since 2000 solely in the field of direct taxation (see http://europe.eu.int/comm/taxation_customs/publications/taxation/document/court_cases_direct-taxation_en.pdf).

²⁰⁵ While the first phase of the research comprise of all the REIT regimes extant in MSs and are studied with their essential criteria this comparative analysis shall not represent case studies though.

findings²⁰⁶, focusing on a limited number of three cases will help to investigate easier any impact of the EU in a real life context.

The three case studies are of France, Bulgaria and Spain, providing for different environments, experience and impact. Beside the doctrinal analysis of the criteria focused i.e. legal requirements and tax treatment of the REIT regimes, the research in its third part is complemented with a political science approach to EU studies based on liberal intergovernmentalism²⁰⁷ seeking to explain why the European integration process in the area analysed is unfolded trying to predict its future trajectory by applying the process of Europeanization to analyse the impact of EU law and to assess potential for law reform i.e. through harmonisation. The case studies allow verification of the impact by the EU and its outcome on domestic level to MS adjusting their REIT regimes accordingly. Focusing on the legal requirements and tax treatment the REIT regimes of the MS subject to the case studies are analysed for their “goodness of fit”. The findings identify the degree of adaptational pressure providing examples for the process of Europeanization though. The cases of France, Bulgaria and Spain have been chosen to provide different examples towards Europeanization. The situation of France a founder MS of the EU established one of the first REIT regimes and thus is impacted by the EU’s “hard” policies since its introduction in 2003, thus representing a case of top-down Europeanization. Bulgaria established its domestic REIT regime before its accession to the EU, thus representing a case of anticipating the EU by a bottom-up process. Spain represents a MS having established its domestic REIT regime most recently, and adapting EU law, revising the tax treatment as a result of cross-loading Europeanization.

Based on this, the research will reach tentative conclusion that the current REIT regimes with its legal requirements and tax treatment needs amendment by MSs and, furthermore, that there is need for new law. Thus, on the findings, the research concludes whether current MS REIT regimes need amendments with their direct tax treatment and/or there is need for a harmonised REIT regime.

²⁰⁶ See i.e. Collis/Hussey (2009).

²⁰⁷ See Bache (2010) with reference to Andrew Moravcsik.

Therefore, in its third part, beside the case studies, the research analyses activities on EU level focusing on “soft” policies established and harmonising activities regarding direct tax treatment. According to Müller (2010) activities by the Commission to harmonise direct tax laws throughout the EU have not been successful and may not be realistic, hindering the development of a universal EU-REIT.²⁰⁸ Though, direct taxation and, thus, harmonisation, is subject to MS’s expressed cooperation due to its sovereignty for direct tax, the research focuses finally to formulate a model concept for a European REIT, the “EuroREIT”, comprising a structure compliant with EU law and proposing for a solution for direct tax treatment. Based on accepted regimes in between MSs such as the automatic exchange of information and tested models for allocating tax revenues in cross-border situations such as the formulary apportionment of income, a concept used in the USA for the apportionment of tax revenue in between its States is discussed. The proposed EuroREIT, therefore, provide concept for the allocation of direct taxes in the MS of residence of a REIT without MS to fear a loss of tax leakage, thus, respecting MS sovereignty though. Having formulated the concept for the EuroREIT steps for its implementation are outlined giving an understanding to the likelihood of the processes giving birth to this regime.

Thus, the research is of comparative law research to trying to identify common themes across different legal system with the intention of assisting harmonisation of laws by providing solution to the fear of loss of revenue by MS and its sovereignty to direct tax. The research, therefore, is to discuss whether the expanding activity of EU institutions incidentally affects MS sovereignty in direct tax.²⁰⁹ Although the discussion involves analysis of the national and EU levels, in relation to the EU-MS relationship, it assumes a high degree of “institutional incorporation” where the host normative order (=MS) makes general provision for the normative decisions of an external agency (=EU law) to be incorporated and to be treated as authoritative within the host normative order.²¹⁰ Furthermore, the research assumes that there is also a degree of intersystem recognition where there is no general assumption of any institutional

²⁰⁸ See Müller (2010), p. 2.

²⁰⁹ See Lickova (2008), p. 463.

²¹⁰ See Walker (2008), p. 373.

mechanism, but there is recognition of another system formalised by the host on a systematic level, understood as intrinsic to the self-definition of the host system, such as incorporation of *jus cogens* norms.²¹¹

In the context of EU law the focus on “institutional incorporation” and connectedness between national and EU legal systems, thus comparative law²¹², seems to require the use of comparative methods within (EU) legal research methodologies.²¹³ Therefore, with its first part the research makes use of comparative law as its research methodology while comparing the different MS REIT regimes under its national legal systems identifying a “common understanding” or model, which in the following is analysed with relevant EU applicable to the identified issues. With finally discussing the degree of harmonisation and potentially reforms of that area, the research is taken form a constitutionalist approach. Constitutionalism in this context shall be understood as “the ideology behind the process of constitutionalisation and the ideology behind constitutions as outcomes”.²¹⁴ Therefore, the research is looking for the possibilities of “constitutional translation” from MS to the EU to identifying evidence of constitutionalisation beyond the MS, thus, the European integration process.²¹⁵ However, this methodological approach primarily focuses on the “problems of translation” of the core normative concepts of constitutionalism from the state to the EU setting²¹⁶, which is an exercise in “rendering the EU more state like” only.²¹⁷ Rather, instead taking a one-dimensional approach and exclusively dealing with doctrinal exposition focusing on the regulatory dynamic of the EU only, account shall be taken of all relevant dynamics including those from the EU to the MS as well as in between MS, thus, considering “how and why the law may be more than the functional handmaiden of political actors”.²¹⁸

Therefore, whereas the starting point of this research is following a doctrinal legal research methodology focusing to answer questions for the harmonisation

²¹¹ Ibid, p. 379.

²¹² See Cryer/Hervey/Sokhi-Bulley (2011), p. 28.

²¹³ The use of “comparative methods” for research in EU law was “traditional” method is pointed out by i.e. Lenaerts (2003).

²¹⁴ See Tsagourias (2007), p.1.

²¹⁵ See Walker (2005).

²¹⁶ See Weiler (1999), p. 599.

²¹⁷ See Cryer/Hervey/Sokhi-Bulley (2011), p. 17.

²¹⁸ See Hunt/Shaw (2009), p. 4.

of laws of MS, emphasis is given to the advantages of a non-doctrinal, more pragmatic approach. This provides opportunity to include aspects related to legal practice and injecting a greater sense of social and political reality into it.²¹⁹

Data collection techniques are both quantitative and qualitative.²²⁰ Quantitative method is considered to include empirical research, whereas qualitative is of descriptive nature, usually for non-empirical data²²¹. For the analysis data is reduced using the mathematical “least common denominator” to identifying the “common understanding” in between the regimes analysed, with regression analysis to gain better understanding in between various relationships and its interactions. The identification of applicable EU “hard” law and analysis of ECJ cases is doctrinal research, predominantly concerned with the analysis of legal principle and how it has been developed and applied. However, this doctrinal research is not simply a case of finding the correct legislation and the relevant cases to making a statement of the law, which is objectively verifiable. Rather, “it is a process of selecting and weighting materials taking into account hierarchy and authority as well as understanding social context and interpretation. For this reason it can be argued that doctrinal research is qualitative”.²²²

Data collection in research may comprise of two types of data, which are primary and secondary data.²²³ The research begins with data about the US REIT model as a framework for analysis of EU REIT regimes. Secondary analysis follows EPRA’s Global REIT Survey²²⁴ providing for REIT regimes globally high quality data readily available and accessible in English language. Other survey data are also employed.²²⁵ For analysis of EU “hard” law data collected is case law by the ECJ, together with any relevant EU legislation dealing with company and/or direct tax law topics. The researcher collected ECJ

²¹⁹ See McConville (2007), p. 90/91.

²²⁰ See Bryman/Bell (2011).

²²¹ See Gummesson (2000).

²²² See Dobinson/Johns (2007), p. 21/22.

²²³ See i.e. Saunders (2009).

²²⁴ See EPRA (2013).

²²⁵ Surveys for secondary analysis used beside EPRA (2013), comprise i.e. Pfnür/Müller (2010), Müller (2010), Eichholtz/Kok (2007), Simontacchi/Stoschek (2012) et al.

decisions since the 1970s with the major emphasis on cases ruled in the last 10 years. Other sources included books, journals, industry reports and statistics etc., especially for the EU “soft” policies discussed.

For primary data, some interviews were undertaken for the three case studies. Generic data of MS REIT regimes included the MS selected for case studies, but the research question required further local information for generating, validating or questioning data on domestic REIT regimes, especially where domestic data was only in local language (especially for Bulgaria). The researcher used semi-structured interviews with local professionals, obtained through his professional network in the European Real Estate Industry built over the last twenty years. These comprised Lawyers and Tax Specialists providing for data on REIT law, company and tax legislation. Since the information required for the case studies varied questions for informants were designed differently, based on a list of themes and areas to cover, with some standardised questions. The researcher omitted or added questions or areas depending on the situation and the flow of the conversation. There was a risk of subjective interpretations or misunderstanding, this was accepted for information not accessible by other means. Using a number of informants safeguarded reliability and validity, and data from surveys and literature could be checked through questions of informants for the purpose of the case studies.

The research considered issues of research ethics during the data collection process.²²⁶ Privacy during data collection was safeguarded since the informants approached were personal contacts of the researcher or introduced by personal contacts. Confidentiality concerning the information shared was assessed on the basis of the nature of information (whether available in the public domain). Anonymity was not an issue for the use of information, and information obtained will not be misused from the interested party in a way that could affect them.

5. Chapter Structure

²²⁶ Discussion of the importance of potential ethical issues can be found i.e. in: *Sunders (2009)*.

This thesis is structured in three sections focusing on the dimensions, mechanisms and outcome of Europeanization in MS REIT regimes. Section 1 introduces the research and the dimensions of Europeanization in EU REITs. Section 2 explores the mechanism of Europeanization that is the “goodness of fit” of MS REIT regimes and adaptational pressure on MS. Section 3 presents the outcome of Europeanization and potential for a harmonised “EuroREIT” going forward.

Section 1 – Introduction and Dimensions of Europeanization

Chapter I: Introduction to the Research sets out this thesis and focus of research, its originality, and importance. The literature review describes source material and its quality. Europeanization is introduced for the conceptual framework, and its methodology underlying the concept of integration of themes and disciplines are discussed. Law, economics and political science theory each provide for parts of a puzzle to draw a holistic view on the development of REITs under the EU Treaty. Finally, the research framework and methodology is outlined and the thesis chapter structure provided.

Chapter II: REITs in the EU: A comparative analysis – This presents a structured framework for comparing MS REIT regimes, identifying the degree of harmonisation and compliance with EU law. This includes definition of the “REIT” and identification of common criteria, a description of the first REIT established, the classical US-REIT regime, as the “model” for its successors. The analysis of the US-REIT provides a structured framework for the following comparative analysis of MS REIT regimes

Secondly, a comparative study analyses the MS REIT regimes in the EU, firstly, looking into technical characteristics and, secondly, evaluating a shared understanding considered for establishing REIT regimes. In the absence of a common definition for REITs a structured framework is applied to test each MS REIT regime against key criteria identified: Legal requirements, Operating activities, Status and Tax treatment.²²⁷ The comparative analysis identifies

²²⁷ In the absence of a undisputed definition and variations of means to indirect invest in real estates some regimes are to be viewed as being REIT-like not meeting the core criteria for a REIT though. Those regimes are out of scope for this research as well as REITs outside the EU

whether the regimes follow a certain model representing a EU typed model of REIT.²²⁸ Based on the results a “common understanding” between the regimes analysed is identified by the mathematical concept of the “least common denominator”. The “common understanding” of EU REITs allows an assessment of “misfit”, thus, the impact of the EU on MS REIT regimes. Where MS have adopted the US REIT model Europeanization would not be involved.

Section 2 – Mechanism of Europeanization: “Goodness of fit” and adaptational pressure

Chapter III: MS REIT regimes and EU law – This chapter focuses on “hard” policies provided by the Treaty and its fundamental Freedoms (primary EU law), identifying the regulations relevant for analysing impact of the EU. Although direct taxation is not of EU competence the Freedoms have unlimited priority and MS’ must exercise their direct taxation powers with the Treaty. EU law as well as International Company law is analysed to identifying connecting factors for the “misfit” test. Focusing on cross-border activities, it identifies investment potentially non-compliant with EU law. Thus, this chapter provides a framework of EU law applicable to REIT regimes with focus on legal requirements (company law) and tax treatment (direct tax law).

Chapter IV: MS REIT regimes and ECJ case law – The ECJ through its case law provides further interpretations of EU law especially on the freedoms. Focus is given to the question whether non-domestic REITs shall legally be eligible to benefit from the domestic REIT regime and its tax treatment for domestic REITs. The research analyses key decisions by the ECJ to set the framework for a domestic tax regime for EU law compliant REITs. A new approach considers ECJ cases of tax origin and also corporate or consumer law. ECJ case law provides additional criteria for the “misfit” analysis of MS REIT regimes and potential infringements of EU law.

in Europe since the political and legal framework of the EU does apply for MSs only but this special framework triggers the movements and processes that will be subject to research here. Therefore, relationships and any horizontal effect for non-EU residents are outside the scope as well.

²²⁸ The focus is on EU REIT regimes, therefore, will exclude the regime established in the non-EU MS Turkey, the GYO, from further analysis in this thesis, even though qualifying as REIT regime though.

Section 3 – “Outcome”: The impact of the EU

Chapter V: REITs in MS - Case Studies – This chapter evaluates case studies of three MS REIT regimes: Bulgaria, France and Spain. These countries show variance in their constitutional structure, administrative culture, judicial structure and culture, and structure of civil society so that it is expected to see variance in the form and degree of Europeanization of its REIT regimes. By incorporating Spain and Bulgaria into the sample it is aimed to counter a selection bias in Europeanization research: studies on small MS still tend to be under-represented²²⁹ as do studies on the new central and eastern European MS.²³⁰ Through the case studies Europeanization becomes visible in respective domestic REIT regimes.

Chapter VI: EU “soft” policies and the EuroREIT – Based on a common understanding between MS a harmonised “EuroREIT” is emerging, but MS sovereignty in direct tax still hinders harmonising the (direct) tax treatment. In the absence of any competence in direct taxation with the EU, “hard” policies are not engaged, and activities of the Commission towards harmonisation are limited. Therefore, the case of “soft” policies and proposals in which the Commission extols the virtue of best practise etc., for example the “moderation” of MS towards harmonisation of structures (i.e. corporate structures, common tax base et al.) is analysed focused on “facilitated coordination”²³¹ by the EU. This chapter provides a model of a compliant European REIT bringing together the findings from the analysis’ to combine its results since a theoretical framework of a European REIT has not previously been subject to research. With the results of this analysis the concept for the “EuroREIT” is outlined and becomes visible with a realistic possibility for its implementation though.

Chapter VII: Conclusion – The Europeanization of MS tax regimes – The analysis shows a convergence of national politico-administrative structures in

²²⁹ See Haverland (2007/2005). Spain may not be considered as a small MS, but a “small(er)” economy different by size versus Germany, UK or France and, thus, not part of the “usual suspects” group (see Vink/Graziano (2007), p. 17).

²³⁰ The CEE MSs have mostly been studied with regard to pre-accession conditionality, e.g. by Grabbe (2006/2001) or Schimmelpfennig/Sedelmeier (2005/2004), but tend to neglected since).

²³¹ See for term by Bulmer/Radaelli (2005), p. 345.

the case of MS REIT regimes. The assumption made in public administration literature²³² that distinctive national models of governance gradually blend into a common European pattern, reflecting the influence of EU practice and increased borrowing between national systems (a “common understanding”) is confirmed. REIT regimes are not public administrative structures, but show patterns of convergence and the “Europeanization” of EU REIT regimes. Necessary interactions in between the two levels of governance and in between the MS are already underway. Compliance of each MS REIT regime under EU law does not necessarily lead to the harmonisation of MS REIT regimes through establishing a EuroREIT, thus harmonisation establishes a common minimum level, rather than a uniform standard throughout the EU.²³³ Pursuing the EuroREIT remains a possible to “Europeanize” REIT regimes.

²³² See i.e. Harmsen (2000), p. 53/54.

²³³ See Goetz/Hix (2000), p. 4.

Chapter II: REITs in the EU – A Comparative Analysis

1. Objectives for this Chapter

This chapter seeks a definition of the REIT and its essential criteria. Focus is given to the US-REIT, the first and so-called “model” REIT. From the analysis of the US-REIT its relevant criteria provide a framework as a basis for the subsequent analysis of REIT regimes in EU MSs. This research is the first comparative analysis of the essential criteria of REIT regimes in the EU allowing the identification of a “common understanding” between them. For the identification of the common understanding, the analysis uses the “least common denominator”. as a starting point to track the impact of the EU.²⁰⁷ The “common understanding” of MSs REIT regimes is compared with the US-REIT model, to identify influences from the US and thus exclude impact from the EU.

The, objectives of this chapter are, therefore:

- providing definition of a Real Estate Investment Trust (REIT);
- analysing the US-REIT – model in order to set up the structured framework for comparative analysis of MSs REIT regimes
- defining the set of MSs REIT regimes extant in the EU;
- conducting a cross-sectional study of MSs REIT regimes along the criteria of the structured framework to establishing a comparative analysis;
- comparing the “common understanding” with the criteria identified for the US-REIT to identify the impact the US-REIT on MSs REIT regimes; and
- identifying the “common understanding” in between MSs REIT regimes based on the “least common denominator” in order set basis to identify the impact of the EU.

²⁰⁷ There is critique that the “common understanding” represents the “least common denominator”-idea does not represent example to the extent to which national politics are Europeanized, rather is represents the bare minimum that is politically possible only.²⁰⁷ Nevertheless, the “common understanding” provides for a starting point to build basic understanding in order to track the impact of the EU (see i.e. Bomberg/Peterson (2000), p. 33).

2. Real Estate Investment Trust (REIT) – A Definition

Investments in the asset class “real estate” can be conducted in various ways. The classical type of investment is directly in a property, by acquiring ownership of the land and building. Private individuals for personal use or a private property portfolio primarily uses the direct investment in real estate. Where the activities are as financial investment, there issues i.e. financing, taxation, management and others become important. For third party financing taxation is important, beneficial tax treatments become more attractive through investment vehicles such as Special Purpose Vehicles (SPVs).²⁰⁸

Indirect investments are selected according to return and risk used primarily by high volume investors, or small volume investors in pooling vehicles such as real estate trusts and real estate funds perhaps not able to acquire a single property at full ownership, or into a private portfolio big enough to provide the benefits of the portfolio. Real estate funds may participate with other investors into a pool of assets to benefit from a diversified portfolio or real estate assets. An external management company dedicated to the pool of assets or distinct to the Investor may manage assets. This is where REITs interest small and large-scale investors.

Usually, these indirect investments are made in a fund or shares of listed or unlisted real estate companies,²⁰⁹ which depend upon the tax treatment applicable in the country of residence.²¹⁰ Different tax regimes create competition among countries and vehicles available. There is, however, no common ranking of vehicles globally since available vehicles and tax regimes vary, as does the taxation of the investor. A vehicle benefits one investor may not be best for another. To take advantage of beneficial tax treatment for real estate investment vehicles, and, attract capital, a number of countries have created special tax regimes allowing benefiting from a “flow-through” treatment. These types of regimes provide for tax transparent treatment leaving the taxation of profits

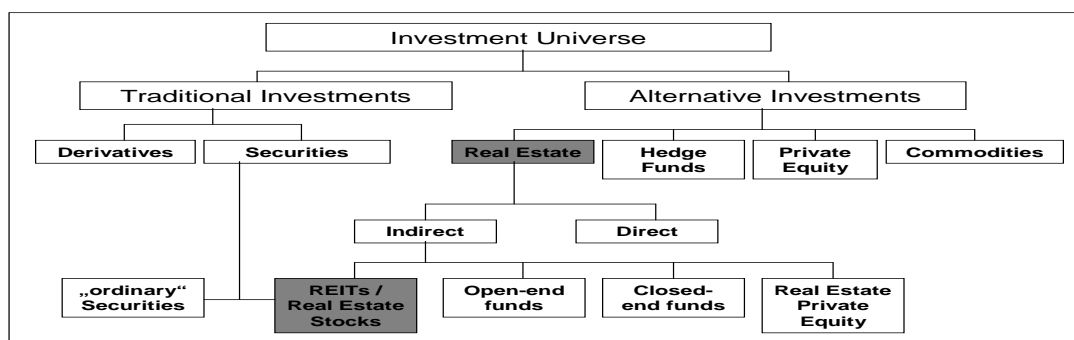
²⁰⁸ See Knoflach/Körfigen (Schäfer 2007), p. 8.

²⁰⁹ See Table II.2-1.

²¹⁰ See Knoflach/Körfigen (Schäfer 2007), p. 8.

distributed to the level of the Investor only²¹¹ and are referred to as “REIT regime”.²¹²

Figure II. 2-1: REITs within the investment universe



Sou

rce: HSBC

Although REITs have existed for more than 30 years there is no general accepted definition. REITs are trusts or publicly listed corporations, formed in accordance with their national regimes, that employ share capital to acquire, manage or finance real estate. They are not trusts as most people will understand the term but they are just like any other private investment company. The substantial difference is that once registered as REITs, companies will benefit from various tax breaks and these advantages are passed on to the investors. The company owns revenue producing commercial and residential properties, which in turn generate potentially high returns for investors. This OECD defines:

“... a REIT is a widely held company, trust or contractual or fiduciary arrangement that derives its income primarily from long-term investment in immovable property (real estate), distributes most of that income annually and does not pay income tax on income related to immovable property that is so distributed. The fact that the REIT vehicle does not

²¹¹ See Kater (Schäfer 2007), p. 53ff.

²¹² This investment vehicle is called “REIT regime” after the US flow-through regime of some 30-years ago (see Chan/Erickson/Wang (2003); Block (2002); Garrigan/Parsons (1997) and Imperiale (2002)). The term “REIT regime” is used in this thesis to refer to the entire set of rules and regulations that apply to REITs irrespective of its sources in either/and corporate, tax or regulatory laws and context applicable.

*pay tax on that income is the result of tax rules that provide for a single-level of taxation in the hands of the investors in the REIT ...”.*²¹³

The EU REIT Coalition defines a REIT as “... a company which:

- has to derive the majority of its income from property investment;
- pays no taxes at corporate level; however, a very high proportion of net earnings is paid out as dividends to shareholders who are then taxed;
- has the option – but not necessarily the obligation – of public listing; and
- functions within a specific legislative framework and under supervision of authorities.”²¹⁴

The term “Real Estate” in this context refers to undeveloped land (“green field”), lots about to be developed, and existing buildings. REITs are corporations, which own and actively manage income generating commercial or residential real estate interests. Forms of investment are classical direct and indirect to purchase, develop, manage and sell property assets. REITs generally receive the majority of their income from passive real estate investments, are often highly liquid stocks, and may operate as stock exchange quoted company (public REIT) or as closed company open to a limited circle of investors (private REIT). They are similar to a privately hold real estate holding company but giving private investors with modest means to invest in a diversified portfolio and own shares in the pooled arrangement (REIT) and benefit from large, professionally managed and operated property portfolios.²¹⁵ A REIT share is thus similar to any other dividend-paying share that represents ownership in an operating business, and has to compete and earn its allocation of capital based on performance, not only on its asset class.

²¹³ See OECD (Report 2007), p. 3 and OECD (Report 2008), in: EPRA (2009), Recital 3.3, p. 8.

²¹⁴ See EU REIT Coalition (2007), Annex II.

²¹⁵ Zell (1997), p. xvii.

However, the most important aspect of REITs is their unique tax treatment that is no tax is levied at the corporate or vehicle level neither for realised capital gains nor on real estate generated income. They are “flow-through” financial intermediary entities; middlemen for the distribution of profits and income to investors provided certain conditions are met. Regardless of national jurisdiction, tax-efficient real estate vehicles generally have certain common features, which include:

- Tax:** Tax transparency of corporate level²¹⁶ and taxation of income levied on the dividends at investor’s level;
- Distribution:** Net income distributed to the shareholders at a minimum in a range of 80 to 100% of their net income;²¹⁷
- Liquidity:** Liquid secondary market due to stock exchange listing.

Though, REITs worldwide are structured in various forms depending on national legislation and avoid taxation at the corporate level,²¹⁸ they are considered to be tax regimes, but also characterised by regulatory requirements and restrictions governed by company laws.²¹⁹ Thus, MS’ emphasis is more on tax law (i.e. Italy and the UK), others with emphasis on company law (i.e. Germany) and others where the REIT regime is not even codified (i.e. the Netherlands). Nonetheless, irrelevant of the codification of a REIT regime in national laws REIT regimes share common features comprising for a REIT regime, which are the features outlined above. Otherwise, a regime lacking of either feature may not be considered being a REIT rather a REIT-like regime only.²²⁰

²¹⁶ Transparency means that, among others, it allows investors to accurately assess the liquidation value of the vehicle’s underlying assets.

²¹⁷ Block (1998), p. 21.

²¹⁸ Chan (2003), p.58.

²¹⁹ Simontacchi/Stoschek (2012), General Report, p. 4.

²²⁰ REIT-like regimes will not be subject to this thesis since EU REIT regimes are of focus only.

3. The US-REIT - The “model” for REITs

3.1 Fundamentals

The first REITs established by way of special trust structures can be found in the USA since 1880, but after a decision by the US Supreme Court in the 1930s REITs lost their special tax status and exemption from the tax transparency.²²¹ The reinvention of REITs came in 1960 with the “Real Estate Investment Trust Act” by the US–Congress²²² introducing a “REIT-Section” into the income tax treatment²²³ to make investments in large-scale, income producing real estate accessible to smaller investors.²²⁴ The Congress decided that the way for average investors to invest large-scale commercial properties was the same as they invested in other industries, through purchasing equity. As shareholders benefit by owning stocks of other corporations, the stockholders of a REIT earn in the same way a *pro rata* share of the economic benefits that derive from the production of income through commercial real estate ownership. Herewith, REITs provide advantages normally not available to smaller investors, such as “... the spreading of risk loss by the greater diversification of investment ... (and) ... the benefits of expert investment counsel”.²²⁵ Over time REITs regulation has been eased further to make them more attractive to investors and increase their competitiveness as an investment product. With congressional blessing of real estate tax shelters, the real estate marketplace was converted from an industry largely disciplined by basic supply and demand, to a real estate marketplace where tax shelters drove the investment and overdevelopment of commercial real estate. That created an explosion of overbuilt, nonviable real estate development activity, and after the 1986 Tax Reform Act investors began seeking current income and long-term growth as a real estate investment performance characteristics. REITs used the new established right to reform its property management services and the Act limited direct real estate investment tax benefits.

²²¹ See Nowak (2005), p. 173.

²²² See Huesmann (2005), p. 41.

²²³ See in its sections 856-860 of the US-Internal Revenue Code (IRC).

²²⁴ See Napoli (2004), p.67.

²²⁵ See US Congress Committee Report in Decker (1997), p. 3.

The Omnibus-Budget Reconciliation Act in 1993 gave Pension-Funds the opportunity to invest in REITs²²⁶; and the REIT Simplification Act of 1997 introduced the “de-minimis-rule” under which REITs were entitled to receive small parts of their income from non-real estate services); and the 1999 REIT Modernisation Act decreased the obligation of REITs to distribute their income to its shareholders from 95% to only 90% of the taxable profit. In 2001 REITs were allowed to reinvest up to 20% of their assets into subsidiaries not necessarily offering real estate services. These tax benefits together contributed after 2000 to a second REITs boom.²²⁷ The REITs target group of potential investors changed from mainly small investors to institutional investors, who now dominate their shareholdings.²²⁸

3.2 Legal requirements

US-REITs may be structured as Corporation, Association or Trust²²⁹ and have to be incorporated in one of the 50 US states or the District of Columbia as taxable for federal purposes. Any entity taxable as a domestic corporation under US federal income tax law can elect to be treated as a US-REIT. Two thirds of US-REITs are organised as corporations under state law, while the remainder are business trusts.²³⁰ Thus, listing at a stock exchange is not mandatory but shareholdings have to be open and publicly tradable and must be transferable without restriction. Therefore, to ensure stock liquidity²³¹, five or less investors may not own more than 50% in a REIT (so called “five-or-fewer rule”²³²).

3.3 Operating activities

All regimes impose restrictions on the permitted activities of a REIT vehicle. The basic underlying principle is that its business scope must focus for purchasing, holding and management and is restricted to only limited interests (so-called

²²⁶ See NAREIT (2005), p. 52.

²²⁷ Stock/Teske (2005), p. 188.

²²⁸ NAREIT (2004), IFD (2005), p. 6.

²²⁹ See Brady/Conlin (2004), p. 81.

²³⁰ See King (1997), p. 49.

²³¹ See Reiss (2005), p. 28.

²³² The requirement must be met during the last half of the taxable year (see IFD (2005), p. 9). Furthermore, the US regime requires the REIT having a minimum of 100 shareholders (“shareholder-test”) until the commencement of the second (living-)year of the REIT (See Brandon (1997), p. 90).

“asset value thresholds”)²³³ that is the “income-test”²³⁴. There is a growing tendency towards a more active investment approach whereby REITs are in fact starting activities of entrepreneurial nature. The US system can here be seen as the most liberal in this respect.

3.4 Status

A minimum of 95% of the invested assets must comprise real estate assets such as real estate property, real estate related investments (including investments in mortgage loans secured by real estate property), cash, government securities, corporate shareholdings or in shares of other REITs. At least 75% of the REITs gross income must derive from real estate related income (rents, mortgage interests or selling assets), however, 95% of the REITs gross income must come from the above-mentioned sources including other passive forms of income such as dividends and interests from non-real estate sources (e.g., bank deposits).²³⁵ Shareholdings in another corporation’s stock are limited to up to 10%.²³⁶ Furthermore, real estate located outside the United States qualifies as a good real estate asset for the Asset test. Therefore, US-REITs have increasingly invested around the world in the last decade and still pushing further overseas.²³⁷

In order to maintain the REIT status it is conditional for the REIT to pay out at least 90% of taxable income as dividends to shareholders²³⁸ allowing REITs to retain additional capital, if deemed to be necessary and appropriate by REIT management. Income generated through divestures (e.g., capital gains) does not need to be distributed to investors.²³⁹

²³³ See Sec. 856 (c) (5) (A), (B) IRC.

²³⁴ See Murphy (2004), p 4/5.

²³⁵ Consequently, no more than 5% of a REITs income may derive from non-qualifying sources, such as service fees, development activities for third parties or a non-real estate business.

²³⁶ Additionally, the REIT Modernization Act of 2001 offered REITs the possibility to create and hold up to 25% of the REITs assets in a TRS, which offers real estate development and trading activities or “dealer property activities” for which the REIT would otherwise need to employ an independent party.

²³⁷ See Smith (2005).

²³⁸ See Sec. 856 (a) to (c) IRC.

²³⁹ Under certain circumstances, however, but not further explained in this thesis, an excise tax may become due if a REIT is not distributing all of its income/capital gains (See King (1997), p 47/48). As a result, most of the capital growth and property maintenance and betterment must come from new money raised in the investment marketplace from investors who have confidence in the REITs future prospects and business plan, from recycling proceeds from like kind exchanges, or by attracting capital through joint ventures.

3.5 Tax treatment

Besides being organised under one states law in accordance with the required legal form of an entity to be qualified as a REIT it must for tax purposes elect the REIT status by filing a special tax return²⁴⁰ for the year in which the company wishes to become a REIT. REITs are regarded as “Investment Conduits”, which avoid taxation in the sense that only net income distributed through dividends is taxed on shareholder level with the full individual income tax rate. There is no taxation on a corporate level unless minimum 90% of the profits are distributed.²⁴¹

With respect to withholding taxes, the US system draws a clear distinction between domestic (US) and foreign shareholders. Only in connection with dividend distributions to foreign shareholders is withholding tax applied. The “ordinary income” dividends (dividends sourced out of ordinary income) are subject to withholding tax at a 30% rate. Such rate can be reduced pursuant to tax treaties concluded by the US with countries of residence of the recipient of the dividend to 15%. The “capital gains” dividends are subject to 35% withholding tax. This withholding tax cannot be reduced under the prevailing tax treaties.

3.6 Sanctions

The violation or breach of single regime conditions will, generally, not trigger a loss of status already but may lead to penalty payment. A failure to the asset test will lead firstly to the obligation to cure for within a 6-month timeframe. Further violation to this as well as i.e. insufficient distribution of income will consequently trigger the taxation of the deficient dividends and the non-qualifying assets, though. Other failures will be penalised with a USD 50.000 payment. Where, however, the REIT cannot prove reasonable cause for its violation of regime conditions or where there is no reasonable cause, the REIT may technically loose its status and will be banned from re-applying for a period of five years.

²⁴⁰ Form 1120-REIT.

²⁴¹ See Martichielli/MacCrate (1996), p. 7.

3.7 Conclusion – The US-REIT as a model for the EU

The US-REIT serves as a model for other REITs comprising of the key criteria outlined.²⁴² The US-REIT functions within a specific legislative framework and under supervision of the US authorities with the option – but not necessarily the obligation – of public listing. Operational activities comprise of passive property investments and services thereto only. Provided the majority of its income is derived from eligible activities the REIT pays no taxes at corporate level, but a high proportion of net earnings at a rate of 90% must be distributed as dividends to the shareholders of the REIT who are then taxed at their individual level.

Table II.3-1: Overview on the US REIT regime

Requirement	Criteria	US REIT
Legal	Legal form	Corporation (LLC./LLP), Association or Trust
	Share Capital	no minimum requirement
	Registered Seat	domestic
	Listing	not obligatory
	Shareholder conditions	min. 100 shareholders Max. 5 single holdings own >50%
Operating activities (Passive property investments)	Acquisition and Sales	qualified
	Leasing	qualified
	Asset Management	qualified for own assets
	Development	qualified for own portfolio
Status	Asset Test	min. 75% of real estate, bonds or cash
		max. 5% "bad income"
		max. 10% shares in another REIT
		max. 20 in TRS
	Income Test	min. 75% from real estate
		min. 95% incl. bonds and cash
	Gearing Test	max. 60%
Tax	Distribution Test	90%
	REIT Level	Tax exempt if distributed
	Capital Gains	Tax exempt if distributed
	Withholding Tax	Generally 30% but may be reduced to 15% in DTT case

Source: Original by W. Speckhahn

The US-REIT requires the REIT to register within the USA. Whereas, it allows for the REIT to stay private since the stock listing of the REIT is optional only. Choosing for staying private as a REIT, its shareholders may not benefit from the liquidity of the stock markets though. A private REIT is not excluded from the

²⁴² See for REIT Definition Section 2, above (EU REIT Coalition (2007), Annex II).

application of the beneficial tax treatment, offering its shareholders tax transparency in full. Profits distributed are neither taxed at the level of the REIT nor at distribution to shareholders, but for cross-border investments by non-domestic shareholders withholding tax applies. Thus, profits distributed are taxed already before being in the hands of the foreign investor at a generally high rate of 30%, reducible under applicable DTT to 15%.

Governments around the world establishing domestic REIT regimes have used the US-REIT as “model”. This research explores whether MS have used the US-REIT model as a “blueprint” to establishing domestic REIT regimes, using the structured framework above for benchmarking MSs REIT regimes against the “model” US REIT.

4. REIT regimes in the EU

A number of countries have since created special tax regimes known as the “REIT regime”, after the US, with countries with an Anglo-Saxon background the first to introduce them.²⁴³ Development was slow with 6 regimes established from 1969 to 1994, but since 2000 more than 20²⁴⁴ countries have established REIT regimes, as a “State of the Art”²⁴⁵ investment vehicle. The global development of REIT regimes included the European real estate and capital markets, but there is a perception that a European REIT market does not exist yet.²⁴⁶

²⁴³ See i.e., Australia, New Zealand, Hong Kong, Japan, Singapore, Malaysia, Taiwan, South Korea, Canada, Puerto Rico and South Africa.

²⁴⁴ There are more than 20 regimes established in Europe and additional further REIT-like regimes too. See Exhibit II.4-1, “Chronological overview on the introduction of REIT regimes globally” (excluding those regimes to be qualified as REIT-like only). Outside the EU, Turkey is the only country having established a REIT regime, introduced in 1995 (See EPRA (2010), Turkey). To date 25 T-REICs listed amounting to a total market capitalisation of USD 8,237mn representing 0.76% of the global REIT market though (See EPRA (2010), Turkey, p. 2). However, since the research focuses on REIT regimes in the EU only, the Turkish REIT will be out of scope and not subject to further analysis though. Different to EPRA (2013, Europe,) and Simontacchi/Stoschek (2012) the REIT in Turkey is regulated mainly by the Communiqué of the Capital Markets Board named as Communiqué regarding the Real Estate Investment Trusts (*Gayrimenkul Yatırım Ortaklıklarına İlişkin Esaslar Tebliği*) (No. 11, Serial. VI) dated November 8, 1998 (“Communiqué”). Switzerland introduced in 2007 the KAG Act, but qualifying vehicles are REIT-like only being comparable with the Luxembourg SIF type contractual Funds not sharing distribution obligations (See Kühne/Schunk/Keller (2009), p. 8, 10f., 33ff.).

²⁴⁵ See Väh (1999), p. 2.

²⁴⁶ See Müller (2010), p. 2. Traditionally, the European markets provided for tax privileged vehicles and regimes as trusts, open-end or closed-end funds, i.e. the open-ended funds in Germany.

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE

REITs in the EU

The first country after the USA in Europe was the Netherlands in 1969 with the establishment of the “Fiscale Beleggingsinstelling” (FBI), but not until the first decade of the 21st century did the European REIT landscape develop significantly. Belgium was second with the SICAFI regime in 1995, followed by Greece’ REIC (1999), France’ SIIC (2003), Bulgaria and its JSSPIC (2004), the UK and German REITs, the Italian SIIQ (2007), Lithuania (2008), Finland and the Spanish SOCIMI (2009)., Hungary (SZIT, 2011) and Ireland (IRE-REIT) were the last MSs to establish their REIT regimes.²⁴⁷ Today, there are some 13 REIT regimes in the EU²⁴⁸, representing more than a third of the global inventory.²⁴⁹

Table II.4-1: REIT regimes in the EU - overview

Year ²⁵⁰	MS	REIT-Regime ²⁵¹	Abbreviation
1969	Netherlands	Fiscale Beleggingsinstelling	FBI
1995	Belgium	Société d’investissement à capital fixé en Immobilière	SICAFI
1999	Greece	Real Estate Investment Company	REIC
2003	France	Société d’investissement Immobilière Cotées	SIIC
2004	Bulgaria	Joint Stock Special Purpose Investment Company	JSSPIC
2007	United Kingdom	UK Real Estate Investment Trust	UK-REIT
2007	Germany	Germany Real Estate Investment Trust	G-REIT
2007	Italy	Società di Investimento Immobiliare Quotate	SIIQ
2008	Lithuania	Lithuanian REIT	L-REIT
2009	Finland	Finish REIT	F-REIT
2009	Spain	Sociedad Cotizada de Inversión en el Mercado Inmobiliario	SOCIMI
2011	Hungary	Szabályozott Ingatlanbefektetési Társaság	SZIT
2013	Ireland	Real Estate Investment Trust	IRE-REIT

Source: Original by W. Speckhahn

²⁴⁷ There are further concepts for tax efficient vehicles extant in the EU i.e. in Austria (Immobilien Investmentfonds, IIF), Luxemburg (Special Investment Fund, SIF) and Portugal (Sociedades de Investimento Imobiliário, SIIMO). However, defining a REIT using the definition following from the “classical” US-REIT these concepts may be understood as REIT-like typed only since missing core criteria of a REIT as to its tax transparency and distribution requirement in particular. Therefore, these regimes will not be subject to further analysis and are out of scope of this thesis that focuses on REIT regimes only. Furthermore, the Swiss SICAV is out of scope as well since Switzerland is not only a non-MS to the EU, but its SICAV regime is REIT-like only.

²⁴⁸ See EPRA (2013b), Simontacchi/Stoschek (2012), Ballázs/Holló (2011).

²⁴⁹ See EPRA (2013b).

²⁵⁰ “Year” refers to the year in which the regime came into effect, even in case of retroactive effect of the national legislation establishing the domestic REIT regime.

²⁵¹ The REIT regime is named using the international accepted notation rather the original one that may not uses the Latin alphabet (i.e. like the ones of Greece, Bulgaria or Lithuania).

5. Characteristics of REITs in the EU

Do REITs in the EU share common features and criteria? The movements and processes can best be analysed by identifying the concepts of the regimes existent. The literature acknowledges that "... REITs around the world are beginning to look and function very much the same "²⁵², or that "... there are many similarities when comparing individual country REIT regimes in Europe ..."²⁵³, or that "... the general framework of the various REIT regimes is to a large extent identical "and "slowly becoming harmonised"²⁵⁴. Extant research comprises comparative illustrations of REIT regimes in large economies of the EU (UK, Germany and France) and established REIT regimes (Netherlands and Belgium). These studies list each regime with its regulations but without peer-to-peer comparison, and studies by Eichholtz/Kok (2007)²⁵⁵ and Müller (2010)²⁵⁶ do not cover all REIT regimes in MSs. For comparative analysis this research uses the criteria in the structured framework, which are the legal requirements (legal form, listing and shareholders), operating activities, status (asset, income, gearing and distribution test), tax treatment and sanctions.²⁵⁷

Focus is given to the identification of a "common understanding" of the REIT. The comparative analysis shows the range of regulations as to core criteria of a REIT. The long history and global success of the classic US-REIT indicates that the regimes introduced by the MSs follow a "common understanding" aligned to the US-REIT model. Special focus is given to the tax treatment as direct taxation is directly linked to MS' national revenue and is likely of special national interest.

²⁵² See Wechsler (2008), p.49.

²⁵³ See Hughes/Lewis (2008), p. 88.

²⁵⁴ See Wijs (2007a).

²⁵⁵ Eichholtz/Kok (2007).

²⁵⁶ Müller (2010).

²⁵⁷ Each MS REIT regime will be tested according those key criteria identified in Sec. 3 above. Therefore, using these criteria some of the existing real estate investment vehicles that are kind of tax beneficial in European countries i.e. the German open-ended fund as well as the Luxembourg Special Investment Fund will not be qualified as REITs since they are lacking some of the core criteria i.e. the existence of any distribution requirement as to dividend payments and the listing of the vehicle at a stock exchange. Consequently, these Fund vehicles (open-ended or closed-ended) of i.e. Germany and Luxembourg will not be further evaluated within this thesis, though.

5.1 Legal requirements

5.1.1 Legal form & Residency

EU REIT regimes mostly require a qualified legal form of a limited liability or a limited partnership with shares under domestic corporate law. Somehow different is the approach of the Netherlands FBI regime that is a pure tax regime, not dependent on satisfying certain regulatory requirements (security laws). The legal form requires a limitation of liabilities²⁵⁸ but leaves its type optional. Consequently, not only a corporate like a NV is eligible for the FBI regime but fund structures such as a FGR.²⁵⁹ Another special form is provided under the UK regime close companies,²⁶⁰ And similarly with the Finnish F-REIT regime.²⁶¹ Lithuania's L-REIT regime provides for a joint stock company and an investment fund managed by a management company.²⁶² REITs in the EU are no special legal corporate types rather stock listed public companies benefiting from special privileges upon registration as REIT with the tax authorities.

Table II.5.1-1: Requirements for Legal form & Residency by MSs REIT regimes

		Legal form	Share Capital	Registered Seat
FBI		NV, BV, FGR or similar foreign legal form	EUR 18.000 - 45.000	domestic (either MS)
SICAFI		SA, SCA	EUR 1,25mn	domestic
REIC		AE	EUR 25mn	domestic (either MS)
SIIC		SA, SCA	EUR 15mn	domestic (either MS)
JSSPIC		Joint Stock Company (AD)	EUR 256.000mn	domestic
UK-REIT		Closed-ended Company	EUR 60.000	domestic
G-REIT		Joint Stock Company (AG)	EUR 15mn	domestic
SIIQ		Società per Azioni (SpA)	EUR 40mn	domestic
L-REIT		Joint stock comp. / Investment Fund	EUR 43.500	domestic
F-REIT		Public limited company (closed-end)	EUR 5mn	domestic

²⁵⁸ E.g. a Public limited (liability) company (NV), a private company with limited liability (BV) or a unit trust (FGR).

²⁵⁹ The FGR "fonds voor gemene rekening" is a unit trust (UK)/mutual funds (US).

²⁶⁰ See sec. 236 of the Financial Services and Markets Act 2000 (HMRC (2005a), section 4 Para 4).

²⁶¹ See EPRA (2013b), Finland, p. 1/2.

²⁶² Minimum share capital LTL 431.600 (approx. 125.000€).

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SOCIMI		SA	EUR 5mn	domestic (either MS or EEA)	
SZIT		Nyrt	EUR 37mn	domestic	
IRE-REIT		PLC	EUR 38mn	domestic	

Source: Original by W. Speckhahn

Requirements for share capital vary significantly according to local corporate laws. There seem to be a three-class society where with the first group requiring capital in a range of <€100.000; the FBI requires the lowest capital at between €18.000 and 45.000 depending on the legal form chosen the L-REIT (€43.500) and the UK-REIT (€60.000). The second group requires substantial capital in a range of some quarter of a million Euros up to 5mn Euro: JSSPIC (€256.000), the SICAFI (€1.25mn), the F-REIT and the SOCIMI (each at €5mn) regime. The third group is asking for double digit amounts of millions of Euros ranging from €15mn (SIIC) to €40mn (SIIQ). The G-REIT regime requires a minimum equity at the end of each business year of at least 45% of the gross asset value²⁶³ and the minimum share capital may be significantly higher. The majority of 9 regimes out of the total 13 require the company for a domestic residency,²⁶⁴ while others allow for residency in either MS or in EU/EEA.²⁶⁵

5.1.2 Listing

According to the legal form by which a REIT has to be established in form of a public corporate almost all MSs require for a listing of the REIT.²⁶⁶ There is one

²⁶³ See § 15 REITG.

²⁶⁴ Group of regimes that require for domestic residency for domestic REITs and at least for a permanent establishment for foreign REITs are for the SICAFI, JSSPIC, UK-REIT, SIIQ, L-REIT, F-REIT, SZIZ, IRE-REIT and the G-REIT as outlined.

²⁶⁵ The group of regimes that do not limit the residence of a REIT being domestically only but allow for residence in either MS are for the FBI, REIC, SIIC and the SOCIMI as outlined.

²⁶⁶ This is a consequence of MS' fear that REIT regimes will be abused for private structures. Consequently, the listing is obligatory even in MS where its REIT regime does not have a mandatory listing but does require for the respective domestic legal form in case the company want to qualify and opt for REIT status. This is the case i.e. for the FBI in the Netherlands. FBIs do not have to be publicly listed companies. However, FBIs, which are listed or market to the public, fall under the supervision of the Netherlands Authority for the Financial Markets (AFM), as does any other investment fund and, thus, benefit from lower regulatory requirements though. The FBI under the supervision of the AFM is sometimes called as a "regulated FBI".²⁶⁶ Similar reasoning exists for the F-REIT where according to the Companies Act a public limited company may be listed only, the Funds-Act provides for a listing unless the Finish Financial Supervisory Authority ("FIN-FSA") grants exemption (see for overview of MS REIT regime requirements i.e. re listing requirements Table II.5.1-1).

exception existing for the L-REIT that may be established by way of a joint stock company, but listing is not mandatory.

Table II.5.1-2: Requirements to the Listing of REITs by MSs regimes

		Legal	
		Listing	Stock exchange
FBI		obligatory for regulated FBIs	any EU stock exchange
SICAFI		obligatory	domestic
REIC		obligatory	any EU stock exchange
SIIC		obligatory	any regulated stock exchange market
JSSPIC		obligatory	any EU stock exchange
UK-REIT		obligatory	any recognised stock exchange
G-REIT		mandatory	either MS / EEA
SIIQ		mandatory	either MS / EFTA
L-REIT		not mandatory	any regulated stock exchange market in the EU / EEA
F-REIT		obligatory	any regulated stock exchange market in the EU / EEA
SOCIMI		obligatory	any regulated stock exchange market in the EU / EEA
SZIT		obligatory	domestic
IRE-REIT		obligatory	any regulated stock exchange market in the EU

Source: Original by W. Speckhahn

More flexibility is given for MS REITs with respect to the location that is the stock. Listing at the domestic²⁶⁷ stock exchange is required for the Belgium SICAFI and the Hungarian SZIT only,²⁶⁸ whereas, all other regimes allow a listing at “any EU” stock exchange (FBI, REIC, JSSPIC) or “either market” in a MS, including the EEA,²⁶⁹ any “regulated” (SIIC, L-REIT, F-REIT, SOCIMI and IRE-REIT), “any recognised” Stock Exchange,²⁷⁰ or in the case for Italian SIIQs²⁷¹ any EFTA

²⁶⁷ Here again, the Netherlands FBI and the Bulgarian JSSPIC allow for a non-domestic listing instead of a domestic one provided that the listing is made at a stock in another MS.

²⁶⁸ See Zorn (2011).

²⁶⁹ Expressively eligible for G-REITs (see § 10 REITG).

²⁷⁰ As defined in sec. 841 of ICTA; See CTA 2010 Chapter 2, Section 528 based on section 106(3) to (9) of, and paragraph 3(1) of Schedule 17 to, FA 2006. The term 'recognised stock exchange' occurs throughout the Taxes Acts and in various tax regulations. For example it is used in the definition of investments which may be held in ISAs and in the qualifying criteria for the quoted Eurobond exemption. Recognised stock exchange legislation is found under S1005 ITA 2007. HMRC considers the designation of a stock exchange as a recognised stock exchange under S1005 ITA 2007 on receipt of a request made by a stock exchange. The fact that a particular exchange is not recognised may simply mean that recognition has not been requested. The phrase 'listed on a recognised stock exchange' in respect of shares and securities is now defined at

country with which an exchange for tax information is granted by respective DTTs, so-called “white-list” countries.²⁷² Similar provision has come into effect with the reform of the Spanish SOCIMI in 2012, making this system more accessible than the stock exchange.²⁷³

5.1.3 Shareholder requirements

REITs are vehicle for private individuals who otherwise have no access to investing into real estate. Therefore, all REITs shall be publicly held to safeguard for access²⁷⁴ provided for the FBI and L-REIT its public legal forms being used though.²⁷⁵ Compliance with this requirement is, furthermore, provided by requirements to types and quota of shareholdings with general and specific typed limitations.²⁷⁶ All other regimes have specific conditions²⁷⁷ providing for limitations for single shareholdings irrelevant of its type of holders,²⁷⁸ a maximum of 10% for single shareholdings, or limiting single shareholdings to a maximum of 5 holding

section 1005(3) ITA. This means shares and securities which: a) are admitted to trading on that exchange and b) included in the official UK list maintained by the Financial Services Authority (in its capacity as the UK Listing Authority) or are officially listed in a qualifying country outside the UK in accordance with provisions corresponding to those generally applicable in EEA states. Although the list established by HMRC for this purpose excludes some countries, it provides for a large number including i.e. South Africa, Thailand and the Cayman Islands (see for lists of “recognised stocks” at: <http://www.hmrc.gov.uk/fid/table1-rse.pdf> and <http://www.hmrc.gov.uk/fid/table2-rse.pdf>).

²⁷¹ The “White-List” see Article 1 para. 374 of law no. 244 of 24th December 2007 (budget legislation for the financial year 2008).

²⁷² The SIIQ seeking listing at the Italian Stock Exchange Market the company is allowed to choose between the MTA market (i.e. “*Mercato Telematico Azionario*”) by following its ordinary listing rules and a listing on the Expandi Market²⁷² by means of a simplified procedure. The MTA is an order driven market and operated by Borsa Italiana for the negotiation of shares, warranties, convertible bonds, UCIT shares or units) by following the ordinary listing rules. Expandi is a market arranged and operated by Borsa Italiana for the negotiation of shares, bonds, warrants and options which are not admitted to official listing at the Italian Stock, the Borsa Italiana. Here, the Borsa Italiana SpA simplifies listing procedures (Market Regulations). Expandi is designed for the purpose of meeting the demands of small and medium enterprises to access capital markets. However, a company that seeks listing at the Expandi market must reach a market capitalisation equal to at least €200m (see Brustia/Masitrello (2009), p. 3; Rizzi (2007), p. 16/17).

²⁷³ See Lucas (2013), p. 40; De Haro/Fernandéz (2013), p. 21.

²⁷⁴ See Table II.5.1-3: Shareholder conditions for REITs by MS regimes.

²⁷⁵ See Sec. 5.1.2 above.

²⁷⁶ I.e. to single holdings, corporate/institutional ones and individual shareholders, free float and voting rights. Here two groups of regimes can be identified which are regimes that require for limitations to any shareholder (FBI and JSSPIC). The FBI requires any company for a minimum of 75% Dutch resident shareholders, either corporate or individual. Whereas, the JSSPIC require min. 50 Founders for establishing a REIT under the Bulgarian regime. (see Table II.5.1-3: Shareholder conditions for REITs by MS regimes).

²⁷⁷ See Table II.5.1-3: Shareholder conditions for REITs by MS regimes.

²⁷⁸ See EPRA (2013b), UK, p. 3; Germany, p. 3.

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more than 5% of the REIT' shares.²⁷⁹ The SIIQ does not allow for more than 51% of the shares being held by a single shareholder.²⁸⁰

Table II.5.1-3: Shareholder conditions for REITs by MSs regimes

	Shareholder conditions				
	Single shareholdings (in general)	Corporate Shareholdings	Shareholdings by Individuals	Free float	Voting rights
FBI	n/A	max. 45%	max 25%	n/A	n/A
SICAFI	n/A	n/A	n/A	min. 30%	n/A
REIC	none				
SIIC	n/A	max. 60%	max. 60%	min. 15% by Individuals with each less 2%	min. 15% by Individuals / max. 60% by Corporate
JSSPIC	n/A	min. 30%	n/A	n/A	max. 5% voting shares by any single holding
UK-REIT	max. 10%	n/A	n/A	min. 35%	n/A
G-REIT	max. 10%	n/A	n/A	min. 15%	max. 3% of each free float holding
SIIQ	max. 51%	n/A	n/A	min. 35%	max. 51% of each single holding
L-REIT	none				
F-REIT	n/A	max. 10%	n/A	n/A	n/A
SOCIMI	n/A	n/A	n/A	min. 25%	n/A
SZIT	n/A	max. 10%	n/A	min. 25%	max. 10% corp. Shareholders
IRE-REIT	max. 5% and max. 5 such shareholdings	max. 10%	n/A	min. 35%	

Source: Original by W. Speckhahn

Limitations for special types of shareholders are provided by almost half of the regimes,²⁸¹ mostly set for corporate shareholdings at a maximum of 10%²⁸² up to a maximum of 60%,²⁸³ or for shareholdings by Individuals at a maximum of 25%

²⁷⁹ See EPRA (2013b), Ireland, p. 3.

²⁸⁰ See EPRA (2013b), Italy, p. 3.

²⁸¹ See Table II.5.1-3: Shareholder conditions for REITs by MS regimes.

²⁸² See i.e. EPRA (2013b), Ireland, p. 3.

²⁸³ See EPRA (2013b), France, p. 3/4.

and 60% respectively.²⁸⁴ Almost all regimes, 8 out of 13, provide for conditions to the free-float of shares ranging from 15% to 35%.²⁸⁵ However, conditional for opting as UK-REIT is the requirement to meet existing regulations on close companies²⁸⁶. The company must have more than 5 shareholders and at least 35% of its shares must be subject to free float at the stock. The same requirement exists for the SIIQ where at least 35% of the shares must be “widely held” as well. But, additionally, there shall be no person (including individual or body or corporate) in a UK-REIT being a “holder of excessive rights”.²⁸⁷ Limitations on voting rights range between 5% (JSSPIC) to 51% (SIIQ).²⁸⁸

5.2 Operating activities

MSs regimes may only invest passively in real estate (option rights on real estate, shares in affiliated companies investing in real estate and real estate certificates). Passive investments are to realise a yield on investment expected for this type of investment, and include acquisition and sale of real property and leasing. Exception is given by the SOCIMI, which is limited to urban real estate.²⁸⁹

Ancillary services and development are generally qualified activities for REITs under most regimes²⁹⁰ except for the SIIQ²⁹¹ and SIIC²⁹², although limitations apply in general for ancillary activities to maximum 20-50% of the GAV,²⁹³ developments to maximum 20 - 40% of GAV and to own account, minimum

²⁸⁴ See EPRA (2013b), Netherlands, p. 3.

²⁸⁵ See Table II.3.1-3: Shareholder conditions for REITs by MS regimes.

²⁸⁶ Within the meaning of section 414 of ICTA.

²⁸⁷ A shareholder is a holder of excessive rights in case he is beneficially entitled (either directly or indirectly) to at least 10% or more (i) of the dividends paid, (ii) the UK-REITs ordinary share capital or (iii) of its voting rights (see CTA 2010 Chapter 6, Section 551ff. and the Definition in Section 553).

²⁸⁸ Ibid.

²⁸⁹ This is an interesting detail of the regime and one shall know that the Spanish law differentiates between urban real estate that are existing within a community and other real estate in rural locations. However, “urban” refers primarily towards residential properties (see Ley Art. 2).

²⁹⁰ See Table II.5.2-1.

²⁹¹ Ancillary activities are not explicitly prohibited but may not exceed 20% of the companies business in total as well. However, the income from “qualifying” leasing activities will benefit from the special tax regime. Consequently, even though the SIIQ may eligibly engaged with ancillary activities up to 20% the respective profits are fully taxable though (see EPRA (2013b), Italy, p.3).

²⁹² See EPRA (2013b), France, p. 3.

²⁹³ So called “crédit-bail immobilier”, have not been counted tax advantageous ancillary activities until end of year 2004 but was changed by the Finance Act 2005.

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holding periods of 3 to 7 years,²⁹⁴ and servicing through a separate legal entity or service company.²⁹⁵) These activities are not eligible for tax exemption under the regime, subject to full²⁹⁶, or partly taxation of its respective income.²⁹⁷

Table II.5.2-1: Conditions to Operating activities of REIT regimes in MSs - overview

		Operating activities (Passive property investments)			
		Acquisition and Sales	Leasing	Ancillary Services	Developments
					Eligibility Conditions
FBI		qualified	qualified	qualified for own assets only	qualified sep. legal entity
SICAFI		qualified	qualified	qualified for own assets only	qualified min. holding 5 yrs
REIC		qualified	qualified	qualified	qualified single development max. 40% GAV
SIIC		qualified	qualified	max. 50% but fully taxable	qualified max. 20% GAV
JSSPIC		qualified	qualified	Qualified through service company	not qualified n/A
UK-REIT		qualified	qualified	qualified	qualified own account only / single development max. 30% GAV / min. 3 yrs holding
G-REIT		qualified	qualified	Qualified through 100% subsidiary only	qualified max. 20% GAV
SIIQ		qualified	qualified	not qualified	qualified not eligible for tax exemption
L-REIT		qualified	qualified	qualified	qualified max. 20% GAV
F-REIT		qualified	qualified	qualified	qualified own account only
SOCIMI		qualified	qualified	max. 50% but fully taxable	qualified min. holding 7 yrs
SZIT		qualified	qualified	qualified	qualified n/A

²⁹⁴ For the FBI there is no such determination expressively but the requirement for a “long-term” holding can be allocated within the range of its peers in the EU (see Table III.5.2-1; EPRA (2013b), Europe).

²⁹⁵ See § 1(2), 3(5) REITG.

²⁹⁶ This is expressly stated for the UK-REIT where even while those business activities that are not property rental business by definition of the CTA 2010 are not qualifying business for benefiting from the UK-REIT regime they are eligible provided that the conditions of the UK-REIT regime as set out in Chapter 2 of the CTA 2010 are still met and are so-called “residual business” of the company (see Definition in CTA 2010 Chapter 1, Section 522 and Chapter 2, Section 531(3)(b)). Eligible business does not mean tax exempted or benefited business at the same time, but is excluded from tax exempt status as developed more detailed below within “Tax treatment” (see Stock/Teske (2005), p. 189).

²⁹⁷ See Table II.5.3-1.

IRE-REIT		qualified	qualified	Qualified but >25% fully taxable	qualified	max. 30% GAV / min. holding 3 yrs	
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Source: Original by W. Speckhahn

5.3 Status

5.3.1 Asset test

All regimes have introduced an Asset test requiring assets of immovable property at a minimum of 70% - 80%.²⁹⁸ Furthermore, some regimes provide additional limitations for single investments at 20%²⁹⁹ - 40%, setting minimum numbers of assets for a qualified portfolio of min. 3 or 4, limitations for own used properties and investments outside EEA,³⁰⁰ limitations to shareholdings in real estate companies of maximum 10-90%,³⁰¹ thresholds to limit investments in immovable property other than real property i.e. mortgage bonds of maximum 10% to 30, limitations for the use and quality of assets and a requirement that assets for investment must be not subject to any legal dispute though.³⁰²

Three regimes limit REIT' activities to residential properties (G-REIT, F-REIT and SOCIMI). Domestic residential properties built before the establishment of the REIT regime are excluded and those built afterwards are qualified investments.³⁰³ Similar case is for the SOCIMI whose activities are limited to passive investments in domestic urban real estate.³⁰⁴ The F-REIT allows residential real estate

²⁹⁸ Ibid.

²⁹⁹ However, this limitation may not be limited to a single real property. According to the Royal Decree of 7.12.2010 (RD of 1.12.2010 a "single asset" is not only considered in the case of a consolidated entity but in case the entity comprise of one or more re property assets as well if they are to be considered to represent a "single investment risk" as may be assessed as such by the FSMA on the basis of i.e. the location of the real property, the final counterparty risk and the economic market risk (See Bollen (2010), p. 13).

³⁰⁰ See EPRA (2013b), Greece, p. 3.

³⁰¹ See Table II.5.3-1.

³⁰² See EPRA (2013b), France, p. 3.

³⁰³ Eligible investment in real estate for a G-REIT that are domestic portfolio properties which are being used primarily for residential use and provided that they have been built before January 1st, 2007. In turn, any investment in domestic residential used property is qualified where the assets have been built after January 2007 and by way or investing indirectly into real estate companies or REITs. However, the market existing for residential properties interesting for institutional investors is comprised of products that are of prior building dates (see § 3(9) REITG).

³⁰⁴ This is an interesting detailing with the Spanish law that differentiates between urban real estate that are existing within a community and other real estate in rural locations. There is no wording to

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investments only to boost housing investment³⁰⁵ and end double taxation of profits.³⁰⁶

Table II.5.3-1: Conditions to Status of REIT regimes in MSs - overview

	Status				
	Asset Test				
FBI	no restrictions				
SICAFI	immovable property	max. 20% of	GAV into	single	Property
REIC	min. 80% qualified investments	max. 90% investments in AE with real estate purpose	max. 10% of total assets own used	single property max. 25% GAV	assets outside EEA max. 10% GAV
SIIC	immovable property	n/A			
JSSPIC	immovable property	max. 10% mortgage bonds	max. 10% in service companies	no assets subject to legal disputes	
UK-REIT	immovable property	min. 3 property for rental business	min 75% assets property rental business	for single max. 40% GAV for single asset	
G-REIT	immovable property (ex. Residential < 1.1.07	min. 75% qualified investments			
SIIQ	immovable property	min. 80% qualified investments			
L-REIT	min. 4 immovable properties	max. 40% GAV single property investment	max. 20% in securities / companies	max. 30% separate real estate assets / company or single comp.	max. 30% securities issued by single real estate company
F-REIT	immovable residential property	min. 80% qualified investments			

exclude commercial real estate investments; however, "urban" refers, therefore, towards domestic residential properties mainly (see Ley Art. 2; See Sec. 5.2 above).

³⁰⁵ See Property Week Global (2010). The Commission has authorised under EU state aid rules the introduction of REITs in Finland that is aiming to encourage investment in affordable rental housing only. However, after respective assurances by the Finish government the Commission was satisfied that the regime does not involve state aid as any profits made by the REIT will be subject to tax at shareholder' level very much like the profits made by individual investors investing directly in the real estate market. This, because the exemption from corporate income tax is linked to the requirement of immediate distribution of annual profits to shareholders, at the hand of which taxation takes place. Thus, this mechanism puts the tax treatment of an investment in a REIT at par with the taxation of direct investments by individuals in real estate (eubusiness.com: "Commission approves tax exemptions for Finnish Real Estate Investment Trusts (REITs)", at <http://www.eubusiness.com/news-eu/state-aid-finland.125, 12.11.2010>).

³⁰⁶ See Flak (2008).

SOCIMI	immovable “urban” properties	min. 80% qualified investments	min. 3 year holding of qualifying assets	
	immovable property	min. 70% qualified investments	max. 20% GAV single property investments	
SZIT				
IRE-REIT	immovable property	min. 75% qualified investments	max. 40% GAV single property investments	min. 3 immovable properties in first 3 yrs

Source: Original by W. Speckhahn

5.3.2 Income test

MSs regimes provide for a minimum volume of income generated from qualifying investments. The thresholds required mostly equal the ones for the Asset test and ranging from 70 to 80%.³⁰⁷ However, almost half (6) of the regimes have not set any restrictions or requirements in this respect.

5.3.3 Gearing test

Going further to the gearing test it appears a more aligned understanding of the regimes with each of them setting for limitations except for the SIIC and the SOCIMI regimes which does not provide for any restrictions hereto, rather, in case of the SIIC, provide for the application of the thin cap rules though.³⁰⁸ The range for eligible leverage is between 20% for short term loans and 80% with the majority of regimes set a maximum at an average of just under 60%³⁰⁹ overall,³¹⁰ whereas, under the UK-REIT and the SIIC regime the leverage quota is up for a financing cost ratio the so-called “balance of business test” of 75:25³¹¹ and the company’ By-laws.³¹²

³⁰⁷ See Table II.5.3-2.

³⁰⁸ The SIIC regime does not provide for any limitation of leverage. However, the French thin capitalization rules in place may, under certain circumstances, lead de facto to a limitation of leverage though but will not be further evaluated here since this is outside the scope of this illustration (see EPRA (2013b), France, p. 5).

³⁰⁹ Special case is with the SICAFI: The RD of 7.12.2010 introduced, however, that in order to secure continue management of the debt ratio, the SICAFI is required to submit a financial plan to the FSMA as soon as the debt ratio exceeds 50% already and to describe measures to be taken to prevent the debt ratio from exceeding 65% and must be affirmed in a special report by the SICAFI statutory auditor (See Bollen (2010), p. 13).

³¹⁰ See Table II.5.3-2.

³¹¹ As a learning from the so-called “financial crisis” and the absence of products as potential qualified investment targets the Consultation paper proposes to take away the pressure for REITs to have its funds reinvested in order to meet the requirements of the “balance of business test” to

5.3.4 Distribution test

Since the distribution requirement is a core criterion, there should be a high proportion of dividends that must be distributed annually but not at a rate of 100% necessarily.³¹³ All REIT regimes in the EU provide for such ratios ranging from 80% to 100%³¹⁴ with the exceptions of the REIC requiring a distribution in at 50% and the L-REIT, with no minimum requirement.³¹⁵

Table II.5.3-2: Conditions to Status of REIT regimes in MSs (cont'd) - overview

		Status		
		Income Test	Gearing Test	Distribution Test
FBI		no restrictions	max. 60%	100%
SICAFI		no restrictions	max. 65%	min. 80%
REIC		no restrictions	max. 75% (max. 40% for Developments)	min. 50%
SIIC		no restrictions	no restrictions (thin cap rules apply)	min. 85%
JSSPIC		no restrictions	short term loans max. 20%	min. 90%
UK-REIT		min. 75% qualified income	Finance cost ratio of 1.25:1	min. 90%
G-REIT		min. 75% qualified income	max. 66.25%	min. 90%
SIIQ		min. 80% qualified income	acc. Company by-laws (max 30% EBITDA interests expenses)	min. 85%
L-REIT		n/A	max. 75% of NAV	no requirement, subject to REIT' bylaws
F-REIT		min. 80% qualified investments	max. 80%	min. 90%
SOCIMI		min. 80% qualified investments	n/A	min. 80%
SZIT		min. 70% qualified investments	max. 65% of GAV	min. 90%
IRE-REIT		min. 75% qualified investments	max. 50% of GAV	min. 85%

Source: Original by W. Speckhahn

extent the holding period for cash enabling the REIT to wait for the right opportunity to invest even the balance of business test might be exceeded (See Woolich (2011), p. 27).

³¹² By-laws may provide for a maximum of 30% of the EBITDA to interest expenses though (see EPRA (2013b), Italy, p. 4).

³¹³ See Barkow/Stanislawek (Schäfer (2007), p. 233 et seqq.

³¹⁴ See Table II.5.3-2.

³¹⁵ While the regime in general is aligned to the classic US-REIT the L-REIT, does not provide for a distribution obligation of the REIT to its shareholders but leaves this to regulate by the REIT itself and its By laws. Herewith, the regime clearly outlines it assumes to see the obligation of profit distributions to be included in the by-laws though (see EPRA (2013b), Lithuania, p.5).

5.4 Tax treatment

The tax treatment of the REIT has already been outlined as its key feature being a tax transparent vehicle.³¹⁶ Following the income of a REIT is not taxed at its level rather flow-through to its shareholders and being taxed at the shareholder's individual level either corporate or individual. Therefore, analysis is made as to whether MSs REIT regimes follow this approach.

5.4.1 Investment scenarios and scope of analysis

In the context of this thesis analysis is given to the tax treatment of income at the level of the domestic REIT in terms of income tax and capital gains tax. Furthermore, since this thesis will analyse the situation of the foreign REIT operating cross-border is of focus though. In this context there are different scenarios for investment possible:

- I. direct in domestic real property;
- II. "direct" in domestic real property through a local special purpose vehicle³¹⁷ that qualifies for subsidiary;
- III. indirect in domestic real property through a (partial) shareholding in a local special purpose vehicle³¹⁸;
- IV. indirect in shares of a local REIT; or
- V. through moving the place of management to investing direct or indirect in real property in the other MS.

For the purpose of the comparative analysis the investment scenarios of a direct investment in domestic real property (Scenario I), and the indirect investment in shares of a domestic REIT (Scenario IV) are of focus. In this "outbound" case question arises as to whether the foreign REIT is eligible to opt for REIT status

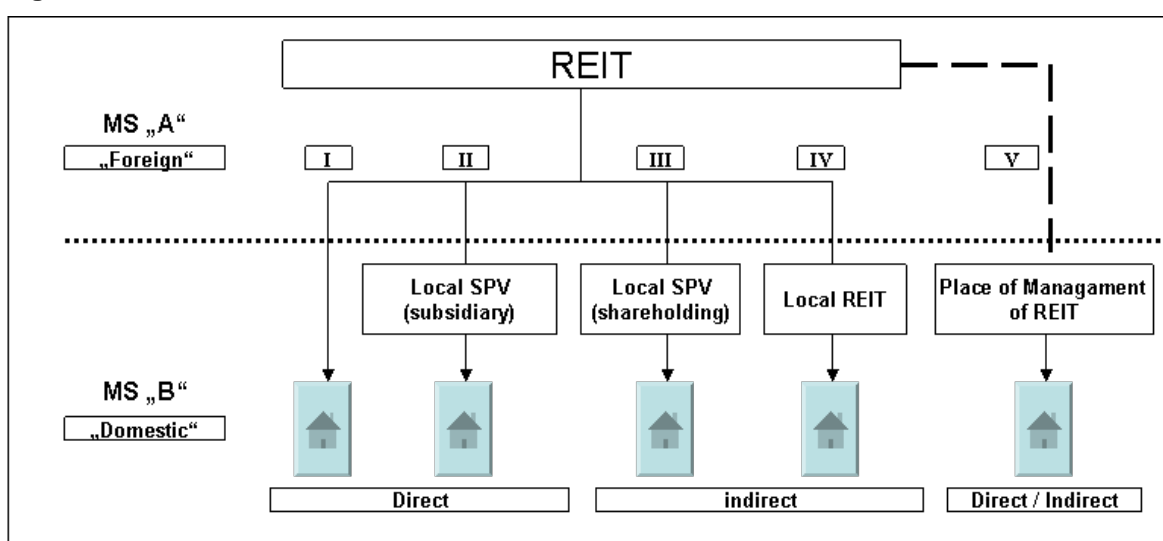
³¹⁶ See Sec. 2 above.

³¹⁷ This investment scenario is viewed of "direct" type since the REIT is setting up its own subsidiary rather through a partial capital participation in a company not qualifying for representation as "subsidiary". A "special purpose vehicle" (SPV) may be set up using any legal form for company according to the applicable domestic law but meeting the conditions set out for qualification as the REIT's subsidiary in that (other) MS.

³¹⁸ The SPV may have a transparent partnership structure or a local corporate structure that might qualify for REIT status locally though (see EPRA (2009), p.10).

under the (domestic) REIT regime in the Host State.³¹⁹ Where in case of an inbound investment the income is not taxed at the level of the REIT the situation for a (corporate) non-resident shareholder in a non-domestic REIT will be of focus for the analysis of the tax treatment at the (foreign) shareholder level and any levied tax from its cross-border activities.³²⁰ Here, the outbound case of an Investor invested in real estate in another MS in general is of interest with regard to potentially discriminatory and distorting elements in MSs (REIT) taxation regimes.³²¹

Figure II.5.4-1: Cross-Border investments – overview of scenarios



Source: Original by W. Speckhahn

5.4.2 Domestic REIT

The tax treatment of a REIT corporation at its level is the most crucial and sensitive part of the regimes due to government's fear of abuse and negative impacts to their overall revenues.

³¹⁹ The case of a foreign REIT investing directly in real property cross-border into another MS where neither a specific REIT regime nor comparable other beneficial treatments for this type of investor is provided is, however, different, especially in the absence of a “EuroREIT” and the non-existence of express mutual recognition. Therefore, the situation of an investment in real property, by a REIT company, in another MS not providing for a domestic REIT regime is out of scope of this analysis. It goes for the foreign (non-REIT) investment company, which does not meet the criteria of another MS’ REIT regime, thus, not being in a substantially comparable situation though.

³²⁰ See EPRA (2009), Recital 3.12. – 3.15., p. 10.

³²¹ The analysis under EU law, however, is subject to Chapter IV below.

(1) Income tax

One of the main features of a full REIT regime is its tax transparency whereby the income of the REIT “flow-through” to the shareholder and is not taxed at the level of the REIT rather in the hands of its shareholders though. This holds true for any portion of income resulting out of the REITs providing for that such income is generated from qualifying activities. Whereas, the tax treatment for any income out of non-qualifying activities does not fall under the tax transparent treatment and is taxed at REIT level according to the ordinary rules for corporate of the respective domestic tax law. Since this analysis’ focus is on REITs and its special business the following focus is given to the treatment of qualifying income only. Generally all regimes provide for tax transparency on REIT level, thus, a full tax exemption.³²²

Two REIT regimes provide a different approach. The REIC imposes taxation of income at a rate of 10% of the ECB interest rate plus 1%.³²³ The income of the SZIT is subject to corporate income tax, but not payable and subject to sanctions only, ³²⁴ with a 2% transfer tax payable at SZIT level, thus the SZIT is effectively tax exempt like the REIC.

(2) Capital gains tax

The situation for the tax treatment of capital gains at the level of the REIT generally follows the “flow-through” approach as well.³²⁵ Thus according to almost all of the regimes capital gains are tax exempt.³²⁶ However, there are some regimes which require the fulfilment of additional conditions to be met that gains are at least accrued into a reinvestment reserve if not directly reinvested they are in fact tax exempt.³²⁷ Exemption has to be made for the SIIQ, which applies the ordinary corporation taxation, but the entry tax would mitigate any incoming capital

³²² See for an overview Table II.5.4-1: Taxation of REIT – overview.

³²³ Since the Interest rates had been held at 1% for just under two years following the financial crisis and global recession it was recently in April 2011 raised up to 1.25%, which represents a very low level though. Thus, at this very low level of the Greece tax rate of just 0.225% (Example: ECB interest rate at 1.25% lead to a tax rate for the income taxation of a REIC as follows: $10\% \times (1.25\% + 1\%) = 0.225\%$ tax payable by the REIC) and represent kind of a “stamp duty” only that the regime can rather be qualified a tax exempt model (see EPRA (2013b), Greece, p. 5).

³²⁴ See Sec. 5.5 below for further details on Sanctions (Dévald/Antal (2011)).

³²⁵ See for an overview Table II.5.4-1: Taxation of REIT – overview.

³²⁶ Ibid.

³²⁷ See i.e. FBI, SICAFI and SZIT (see i.e. for FBI EPRA (2013b), Netherlands, p. 6), whereas L-REIT and F-REIT require additional conditions to be met.

gains.³²⁸ In the F-REIT the tax exemption may be mitigated by a penalty tax charge linked to certain additional conditions on the sale of less than 10% of the assets during a tax year.³²⁹

5.4.3 Foreign REIT

(1) Shareholder in domestic REIT

Applying tax transparent treatment to distributions of dividends to the non-resident shareholder leaves the Host State without tax revenue due to the tax sovereignty of each MS. Therefore, the MS of residence of the REIT may generate tax revenue from domestic income only by levy tax at source³³⁰.

Therefore, most MSs levy tax on distributions from the REIT to non-resident shareholders through withholding taxation of dividends distributed by the domestic REIT. Consequently, all MSs regimes except two provide for withholding taxation rules.³³¹ Only the REIC³³² and JSSPIC³³³ do not withhold tax at the distribution of dividends to its non-resident shareholders, all the others withholding tax at rates between 15% and 28%,³³⁴

³²⁸ See EPRA (2013b), Italy, p. 5.

³²⁹ See EPRA (2013b), Finland, p. 5. Furthermore, a penalty tax mitigating the tax exemption are where shares in mutual real estate companies have been held for five years, and at least ten years have elapsed from the initial use of the buildings owned by a mutual real estate company and more than five years have elapsed from a comprehensive modernisation fulfilling certain criteria (as defined in legislation).

³³⁰ See EPRA (2009), p. 11. It is outside the scope of this analysis to give overview or elaborate on each of the types of shareholder situations and their (individual) tax rates in MS for dividend received. A overview of the taxation of investments in commercial real property in Europe is given by Werner (2002).

³³¹ See for an overview Table III.5.4-1.

³³² See EPRA (2013b), Greece, p. 8.

³³³ See EPRA (2013b), Bulgaria, p. 7. However, this exemption from withholding tax applies only where the corporate shareholder is a EU/EEA resident. Otherwise, a 5% withholding tax is levied though.

³³⁴ Under the SZIT regime withholding tax applies at ordinary corporate tax rates, which is 19% according to a survey of global corporate tax rates by KPMG. A 10 percent corporate income tax rate applies for taxable income up to HUF 500 million (approximately USD.2.500.000). The excess is taxed at 19 percent. These rates are expected to be applicable also in 2013. An additional local business tax (LBT) of up to 2 percent is applicable based on the adjusted net sales (certain expenses are deductible). This local business tax is deductible for corporate income tax purposes. From 1 July 2007, a minimum tax (AMT) applies. The AMT base amounts to 2 percent of total income, as decreased by the cost of goods sold and the value of intermediated services and some further adjustments. Please note that deduction of cost of goods sold and mediated services is capped (see KPMG (2013)).

A special case is the SICAFI, which does not levy withholding tax and seems to fall in the minority group of MSs like Greece and Bulgaria, but this reflects an exception only where the income by the foreign REIT was not received from a domestic company.³³⁵ Considering that usually investments in real property are made through the interposition of an SPV,³³⁶ a resident company, the income generated must not benefit from the exemption, but is subject to a withholding tax at a rate of 25%. As the assessment depends on the type of activity of the foreign REIT, the levy of withholding tax on its income from domestic activities is not excluded the regime is similar to most MS' that apply withholding tax.

Almost all regimes provide eligibility for the foreign shareholder for a tax credit under the regulations of an existing DTT, generally based on the OECD Model Treaty where a withholding tax at a rate of 15% applies.³³⁷ In addition to the DTT's, the foreign REIT' being a corporate investor from another MS could also benefit from the Parent-Subsidiary-Directive. Above an ownership level of between 10% and 25% specified by the respective applicable DTT, foreign investors are entitled to demand that their withholding tax rate be reduced between 5% and 15%. If the Parent-Subsidiary-Directive is applied, withholding tax may not be levied at all in some cases. It is therefore possible to avoid withholding taxation in full where the respective rate is 15% or lower, whereas, in other cases the final levy can be reduced significantly though.³³⁸

(2) Direct investment in domestic real property

The foreign REIT may operate cross-border in another MS through investments in real property in the Host State. The domestic REIT shall not view the treatment of income by the non-domestic REIT generated from these direct investments different to investments. Repatriation of profits from direct investments generated cross-border affects MS' tax sovereignty and may forfeit tax revenue. Whether a foreign REIT may be burdened with any tax levied on income generated from

³³⁵ See EPRA (2013b), Belgium, p. 9.

³³⁶ The use of SPVs for investment into Belgium real property is market usage, since in the case of sale of the real property any sale conducted by way of an "Share Deal", that is to sell the shares in the SPV holding the real property, is treated tax advantage under Belgium law due to the non-applicability of transfer tax which in case of an Asset Deal would be triggered though.

³³⁷ See Art. 10 II OECD (2012).

³³⁸ Therefore, this tax rate is recommended as a solution for cross-border investments in the case of REITs in the EU by EPRA as well (see Wijs (2010), p. 13).

domestic investments in real property at the repatriation of such income into its Home State is subject to eligibility under the REIT regime in the Host State. However, the domestic regime usually is not eligible for the foreign REIT to benefit there from. An exception may be made for two regimes, which are the FBI and the SIIC regime under which a foreign REIT may apply for treatment under the domestic regime provided, however, the foreign REIT meets all requirements under the respective regime though.³³⁹ In all other cases the foreign REIT will be treated under the domestic rules with its income generated from its direct investment in real property in the Host State under the ordinary rules applicable for a non-resident corporate.³⁴⁰ The rules applicable under the respective domestic regimes provide for tax rates between 10% (JSSPIC) and 33,99% (REIC)³⁴¹ subject to any DTT, credit and relief in the Home State.

Table II.5.4-1: Taxation of REIT – overview

REIT	Domestic REIT		Foreign REIT		
	Income	Capital Gains	Indirect withholding tax	Direct investment	
				domestic regime eligible	tax treatment
FBI	0% Tax (effectively exempt)	tax exempt, unless distributed	15% but tax credit in DTT case possible	yes, provided foreign REIT meet all requirements for FBI	0% Tax (effectively exempt)
SICAFI	tax exempt	tax exempt, unless distributed	15%-25%, depending on income source, but tax credit in DTT case possible	not eligible	ordinary treatment for non-resident corporate
REIC	10% of ECB interest rate plus 1%	tax exempt	n/A	not eligible	ordinary treatment for non-resident corporate at 33,99%
SIIC	tax exempt	tax exempt	15% but tax credit in DTT case possible	yes, provided foreign REIT meet all requirements for SIIC	tax exempt
JSSPIC	tax exempt	tax exempt	n.a.	not eligible	withholding Tax at 10%

³³⁹ Under the condition that a foreign REIT is comparable in nature, form and behaviour to an FBI and comply with all FBI requirements it is eligible to obtain FBI status and, thus, benefit from the 0% tax treatment for its domestic income though (see EPRA (2013b), Netherlands, p. 9). In France the election for SIIC regime is possible too subject the foreign REIT meets the conditions under the SIIC regime with regard to the legal form, shareholder requirements and the Asset test (see EPRA (2013b), France, p. 12/13).

³⁴⁰ See for an overview Table II.5.4-1.

³⁴¹ Ibid.

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UK-REIT	tax exempt	tax exempt	20% but tax credit in DTT case possible	not eligible	ordinary treatment for non-resident corporate at 20% (income and cap. gains)
G-REIT	Fully tax exempt	tax exempt	25% + 5,5 solidarity surcharge = 26,375% total but tax credit in DTT case possible	not eligible	ordinary treatment for non-resident corporate
SIIQ	tax exempt	ordinary corporate taxation	20% but tax credit in DTT case possible	not eligible	ordinary treatment for non-resident corporate at 27,5%
L-REIT	tax exempt	tax exempt	24,5% but tax credit in DTT case possible	not eligible	ordinary treatment for non-resident corporate at 15% withholding tax
F-REIT	tax exempt	tax exempt, subject to conditions	max. 28% but tax credit in DTT case possible	not eligible	ordinary treatment for non-resident corporate
SOCIMI	0% Tax (effectively exempt)	0% corporate income tax	21% but tax credit in DTT case possible	not eligible	ordinary treatment for non-resident corporate
SZIT	Income fully tax exempt, but 2% transfer tax	tax exempt, unless distributed	yes, at ordinary corp rates	not eligible	ordinary treatment for non-resident corporate
IRE-REIT	tax exempt	not taxable	yes, at 20%	not eligible	ordinary treatment for non-resident corporate at 20%

Source: Original by W. Speckhahn

5.4.4 Findings

The tax treatment by MS' REIT regimes follows the concept of tax transparency in general. This holds true especially for the treatment of the income of the (domestic) REIT at its level that "flows-through" to its shareholders. The MSs regimes do neither levy income tax nor capital gains tax. The latter holds true except the SIIQ regime under which capital gains are subject to ordinary corporate taxation though.³⁴²

The flow-through concept, however, is implemented down to the shareholder level in case of the shareholder being resident only. Different result is found, however, for the non-resident shareholder. In order to safeguard for tax revenue all MSs

³⁴² See Table II.5.4-1.

levy withholding tax on any distributions by their respective (domestic) REIT to their (non-resident) shareholders. Consequently, the non-resident shareholder has to experience its distributions received from the domestic REIT are levied with withholding tax.³⁴³ This treatment is applied in case of cross-border activities by the non-resident (foreign) REITs as well. As the foreign REIT will not be eligible for the domestic REIT regime there is benefit from the tax exemption at its REIT level. However, the foreign REIT is treated according ordinary rules applicable for non-resident corporate³⁴⁴ at rates on average above 20% though.³⁴⁴ The only exemptions are provided under the FBI and SIIC regimes, which are eligible for a non-resident REIT as well provided, however, the foreign REIT is capable of meeting all of the requirements under the FBI or SIIC regime respectively. However, within the group of the MS³⁴⁵ regimes these two regimes are truly unique in this respect, whereas, all other regimes apply for domestic REITs only.³⁴⁵

Where withholding tax is levied to the dividend payment made by the REIT to its foreign shareholder, compensation will be eligible for a tax credit, relief or any other means of reduction of the tax in the case of and according to a DTT to be applied. Where DTTs are applicable and provide for the usual rate at max. 15%³⁴⁶, the taxation may be eliminated economically in full. However, this case was found under the SIIC regime only, whereas, with most other regimes withholding tax will apply at rates higher than those possibly compensated under a DTT. Therefore, taxation of profits still remains since the respective tax rates are at a level above 20% regularly though.³⁴⁷ Thus, the economic burden from this taxation is with its shareholders while being immediately deducted from the dividend payments made to the non-domestic shareholders.

5.5 Sanctions

Each regime requires conditions to be met by the company before being eligible or qualified for entering the regime and becoming a REIT. Consequently, those conditions and requirements have to be fulfilled in each of the following years after

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ According to the recommendation by Art. 10 II OECD (2012) at the rate of 15%.

³⁴⁷ See Table II.5.4-1.

having qualified for REIT status. Thus, compliance with the regime conditions is monitored constantly³⁴⁸ with sanctions applies in case of non-compliance. However, there is no consistent concept within the regimes providing for a catalogue of sanctions rather there are provisions in a more or less specified way. Common approach by the regimes is that difference is made with a view to the violation or breach of regime conditions. Here, two groups of sanctions can be identified. The first group of sanctions is leading to penalties, whereas the second group of sanctions leads to the loss of status.³⁴⁹

5.5.1 Penalties

As a rule with all regimes the breach of single regime conditions³⁵⁰ is sanctioned with penalties only.³⁵¹ The penalties, however, are mostly not expressly specified but usually include specifications for remedy by the REIT³⁵², recommendations by the supervisory authority with a view to regularising the situation or impose temporary or suspending sanctions,³⁵³ up to penalty payments,³⁵⁴ tax burdened for “breach adjustment”³⁵⁵ introduced by refusal of

³⁴⁸ See EPRA (2013b), Europe.

³⁴⁹ See Annex 1, European REITs – Specifics overview.

³⁵⁰ Regime conditions are usually those related to the legal requirements, operating activities and status. However, the SOCIMI provide for information obligations and penalises a violation of this obligation already (see Ley).

³⁵¹ Exemption, however, is with certain violations in case for the G-REIT that even in case they are not met no consequences are provided for. This holds true i.e. for the Asset and Income test requirements to a REIT servicing company. EPRA summarizes that a breach of the 20% limits set in § 12 REITG are covered and penalised under § 18(5) REITG. However, there is no justification for since § 16 (6) REITG does not provide for services by the REIT-Servicing company defined in § 1 (2) REITG but expressly refers to activities by the G-REIT or its real estate Subsidiaries defined in § 1 (1) Nr. 2 REITG. There, § 1 (1) REITG clearly makes a differentiation in between those real estate companies (§1 (1) Nr. 2 REITG) referred to in §§ 16(6), 18(5) compared to REIT-Servicing companies (§ 1 (1) Nr. 3 REITG).

³⁵² Most of the breach of the “tests” that must be fulfilled for being under REIT status may only seen as a “minor breach” that are to be ignored. This holds true for the conditions set out in Chapter 2 of the CTA 2010 (the “conditions”) i.e. the conditions for company, the property rental business, distribution of profits and the balance of business (CTA 2010 Chapter 8, Section 561-566). However, the UK-REIT has to give notice to an Officer of the Revenue and Customs (CTA 2010 Chapter 8, Section 561(2). The notice shall be given by an “officer of the Revenue and Customs” rather “the Commissioners for HMRC”; see Notes CTA 2010, Chapter 9, Section 572, sub-section 1798 ; CTA 2010 Chapter 9, Section 572) at any time a relevant breach happens to the conditions (CTA 2010 Chapter 8, Section 561(3)) including a specification for remedy (CTA 2010 Chapter 8, Section 561(4)).

³⁵³ E.g. the BCF may ask the market authorities to suspend the listing of the shares of such SICAFI) (see EPRA (2013b, Belgium, p. 8).

³⁵⁴ According to Art. 31 SPIC penalties range from BGN 5.000 (EUR 2.500) to BGN 10.000 (EUR 5.113).

³⁵⁵ See i.e. under the UK-REIT regime: To ignore a “minor breach” means that these cases will not cause the UK-REIT regime to terminate for the company See Notes CTA 2010, Chapter 8, Section 563-564, 566 and 568, sub-sections 1773, 1776, 1783 and 1790). However, those cases may lead

respective income gained through the violation. Thus, this income portion is taxed according to the ordinary tax rates like an ordinary company without REIT status.³⁵⁶ Exemption is provided under the FBI regime that may be viewed as being more flexible or stringent though. Under this regime Penalties are not envisaged anyways. Where an FBI constantly is in breach of single regime conditions is at risk to losing its status though.³⁵⁷

5.5.2 Loss of Status

The REIT is at risk of losing its tax transparent status under all regimes when constantly breaching single regime requirements over a certain period of time or a multiple violation of regime requirements (“serious breach”³⁵⁸).³⁵⁹ The relevant “period of time” for a constant breach may be within a fiscal year, but may be longer depending the type of requirement up to 3 to 10 years³⁶⁰ with the sole exception for the REIC.³⁶¹

to additional taxes on profits that have been gained out of such breach serving as a penalty to the UK-REIT only. Additionally, the HMRC has the power to levy additional taxes if they consider that the UK-REIT has entered into arrangements with the main purpose of obtaining a major tax advantage (CTA 2010 Chapter 5, Section 545) (see UK-REIT at CTA 2010 Chapter 5, Section 545 (Tax Assessment by HMRC); CTA 2010 Chapter 6, Section 551 (Tax consequences of distributions to “holder of excessive rights”).

³⁵⁶ This was seen recently happening with “Foncière Massena”, the real estate arm of Group Assurances du Credit Mutuel, which have been one of five SIICs which saw its tax privileges suspended in 2010 and leading to tax payments due to this suspension of € 7mn. The suspension followed difficulties with the stock market context in the first semester of 2010 that did not allow Foncière Massena to comply with the shareholding requirements that is the requirement to keep the maximum shareholding by a single shareholder at a maximum of 60%. This non-compliance has led to the “final-exit” from the tax transparent status of the SIIC Regime after December 31st with a further €11mn in exit costs. Majority owners in a total of five French SIICs were required to sell shares before the end of 2010 to avoid the loss of status i.e. losing their tax transparent status. Aside from Foncière Massena, they are SIIC de Paris, Tesfran, Doci Lyonnais and MB Retail Europe. All of them have yet to comply with the regulation (see PropertyEU (2012a)).

³⁵⁷ See EPRA (2013b), Netherlands, p. 5.

³⁵⁸ See UK-REIT at CTA 2010 Chapter 9, Section 574 according to which a breach is a “serious breach” of at least two different conditions that have occurred during a ten-year period and that the UK-REIT has not relied more than 4 times on minor breaches during that certain time CTA 2010 Chapter 9, Section 577(2) - (4)).

³⁵⁹ See Table II.5.5-1: Sanctions by REIT regimes in MS - overview

³⁶⁰ Where, however, the G-REIT violates i.e. any of the aforementioned conditions not only once but a single condition consecutive over a period of 3 years the G-REIT will lose its status with the ending of the third business year of the G-REIT. This applies not only to the Asset and Income test but to the minimum equity requirement as well as to the free float conditions and the maximum single shareholding requirement too (see § 18 (3) – (5) REITG). Moreover, the violation of any condition out of the Asset and Income test, the Distribution test and/or to the way of providing ancillary services to third parties for a period of five consecutive years will lead to the loss of status as well effective with the end of the fifth business year of the G-REIT (See § 18(5) REITG). As a general rule it is fair to conclude that a minor breach will not lead to a removal from the regime unless the breach a “serious breach” (CTA 2010 Chapter 9, Section 574) of at least two different conditions that have occurred during a ten-year period and that the UK-REIT has not relied more

Table II.5.5-1: Sanctions by REIT regimes in MSs - overview

	Sanctions	
	Penalty	Loss of status
FBI	n/A	constant breach of (single) regime requirements during tax year
SICAFI	violation of (single) conditions	constant breach of (single) regime requirements
REIC	violation of regime conditions	n/A
SIIC	violation of (single) conditions	constant breach of (single) regime requirements
JSSPIC	violation of (single) conditions	systematic breach / failure of conditions
UK-REIT	violation of certain REIT conditions, ex minor breaches	constant breach of regime requirements over 10 year period
G-REIT	violation of (single) conditions	constant breach of (single) regime requirements/ Delisting and Trading
SIIQ	violation of (single) conditions	constant breach of single regime requirements
L-REIT	violation of (single) conditions	violation of regime requirements
F-REIT	violation of (single) conditions	arrangements with purpose of tax avoidance
SOCIMI	violation of information obligations	violation of regime requirements
SZIT	violation of information obligations	violation of regime requirements
SZIT	violation of (single) conditions	violation of regime requirements

Source: Original by W. Speckhahn

5.6 Findings

The comparative analysis shows differences in the criteria for MSs REIT regimes. The main conclusion is that the REIT regimes analysed all comply with the criteria for a REIT, based upon the three cornerstones of REITs:

Liquidity - through providing a secondary market due to mandatory stock listing

Distribution - of profits almost in full to the shareholders and

Tax transparency - at REIT level shifting the taxation of income at investor's level.³⁶²

than 4 times on minor breaches during that certain time (CTA 2010 Chapter 9, Section 577(2) - (4)).

³⁶¹ See EPRA (2013b), Greece, p. 5.

³⁶² The understanding holds true for the treatment of the domestic REIT and its income at domestic level distributed to the domestic shareholder though (see Sec. 5.4.2 above).

For the investor REITs are a capital markets instrument with attractive tax treatment, but large disparities exist under national policies.³⁶³ Aside from technical criteria, European REIT regimes aim to create an advantageous position within its domestic market and within the competition of the MSs regimes to attract capital flows³⁶⁴ in its domestic market through FDIs in general or specifically in its REIT regime.³⁶⁵ Legislation for public REITs with domestic ownership serves several economic policy goals of strategic domestic importance to its local real estate market.³⁶⁶ Thus, MSs created economic incentives to attract institutional investors as identified in the case of the G-REIT and the SIIQ regime.³⁶⁷

Table II.5.6-1: Spectrum of requirements to REIT regimes in the EU - overview

Requirement	Minimum		Maximum	
	Rule	Regime	Rule	Regime
Legal				
Legal form	Investment Fund	L-REIT	Joint Stock Company (AG)	G-REIT u.a.
Share Capital	EUR 43.500	L-REIT	EUR 29mn	REIC
Registered Seat	domestic (either MS or EEA)	SOCIMI	domestic	G-REIT u.a.
Listing	not mandatory (Private REIT allowed)	L-REIT	mandatory	G-REIT u.a.
Stock Exchange	any regulated stock exchange (EU, EEA)	SOCIMI	domestic	SICAFI
Shareholder conditions	none	L-REIT / REIC	max. 5% single shareholdings and less 5 such shareholdings	IRE-REIT
			max. 10% corporate shareholdings	IRE-REIT
			min. 35% free float	IRE-REIT

³⁶³ Here, large disparities exist mostly owed to singular national politics. MS' structures aim to secure for preventing loss of tax base due to a fiscal competition of the Regimes existing (see Hughes/Lewis (2008), p. 88).

³⁶⁴ See Knoflach/Körfigen (Schäfer 2007), p.4.

³⁶⁵ This was publicly communicated recently by the Hungarian government, which stated its motivations to introducing the SZIT in an attempt to "... make the Hungary one of the most competitive MS and the financial services centre of CEE or the *Luxembourg of Eastern Europe* ..." (see kvg (2011)).

³⁶⁶ See kvg (2011).

³⁶⁷ The investments in a G-REIT qualify to the real estate quota for the tied asset pool of i.e. Insurance Companies and Pension Funds because the regulator as being comparable to a direct real estate investment accepts it. The Italian SIIQ Regime on the other hand exempts Pension- and other Investment-Funds, as well as SIIQs, from any withholding tax (see EPRA (2013), Italy, p. 5).

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REITs in the EU

Operating activities (Passive property investments)				
Acquisition and Sales	Qualified with no major differences			
Leasing	Qualified with no major differences			
Ancillary Services	qualified	REIC	Max. 50% "ancillary" but fully taxable	SIIC
Development	qualified w/o condition	SZIT	not qualified	JSSPIC
Status				
Asset Test	no restrictions	FBI	min. 80% passive investments	REIC
Income Test	no restrictions	FBI	min. 80% qualified income	REIC
Gearing Test	n/A	SOCIMI	max. 30% /max. term 1 year	JSSPIC
Distribution Test	n/A	L-REIT	100%	FBI
Tax (REIT level)				
Income Tax	tax exempt	SICAF	10% of ECB interest rate plus 1%	REIC
Capital Gains	tax exempt	G-REIT	Ordinary corporate taxation	SIIC
Withholding Tax	n/A	REIC	max. 28% but tax credit in DTT case possible	F-REIT
Sanctions				
Penalty	n/A	FBI	violation of information obligations	SOCIMI
Loss of status	Delisting and Trading / shortfall of distribution, breach shareholder requirement	G-REIT / SIIC	n/A	REIC

Source: Original by W. Speckhahn

Albeit differences in details the general approach is very similar in between the MSs regimes.³⁶⁸ The comparison of each of the conditions shows a spectrum in detail with restrictions by regimes providing for complex regulations, more liberal requirements, and others not providing for any limitations at all. However, the analysis has provided result that in between the regimes their regulations are very close usually providing for a limited range of conditions and requirements that are similar if not equal, thus a wide understanding of common criteria'.³⁶⁹ Beside similarities identified with the comparative analysis in between MSs REIT regimes there is question whether these similarities represent a "common understanding" already, building basis for the harmonisation of European REITs to towards a "EuroREIT" regime though.

³⁶⁸ See ANNEX 1, European REITs – Specifics.

³⁶⁹ Ibid.

6. Existence of a “common understanding”

The question whether there is joint “European” understanding extant is, therefore, analysed further, and common criteria of the EU REIT regimes are analysed to identify the existence of a case for a “least common understanding”. “Common understanding” in this respect does not reflect any unanimous nor equal understanding. Rather, it is referred to as “the understanding” that is found as some basis shared in all of the regimes and its requirements. Mathematically, the “least common factor” describes the factor that is the lowest number to be found for two numbers that are possible to divide a denominator in an equation.³⁷⁰ Outside mathematics this concept is not applicable but its idea is used in everyday language.³⁷¹ Here, the saying used refers to the “least common factor” as the understanding that is common in between different opinions expressed to a certain topic and, therefore, shared in between the opinions even though they are still not conform.

The saying of the “least common understanding”, however, may be understood critically as a compromise at the lowest level and, therefore, being of questionable consensus.³⁷² Some say this is exactly the way that usually politics is made on the level of the EU what is called “harmonisation”. While aiming to create a common market within the harmonisation of rules and regulations the outcome of the harmonisation debate seems to be the lowest level shared in between rules and regulations. This process, however, is viewed as “a race to the bottom” whereby step by step the common market becomes a market of the lowest quality. However, the identification of the existence for a “common understanding” in between MSs REIT regimes shall not promote a non-quality level but identify a joint understanding being a level playing field from which possible solutions acceptable by MSs can be drawn. Hereto, coming from the analysis the spectrum of MSs regime solutions comprise of joint understanding expressed by common philosophies and the visibility of common grounds. The “common understanding”

³⁷⁰ See Wikipedia.org at: http://de.wikipedia.org/wiki/Gemeinsamer_Nenner.

³⁷¹ The “Common understanding” is used i.e. in German language being a metaphor for a joint agreement (see Wikipedia.org at: http://de.wikipedia.org/wiki/Gemeinsamer_Nenner).

³⁷² See Wikipedia.org at: http://de.wikipedia.org/wiki/Gemeinsamer_Nenner.

in this respect and as a result of the analysis given above can be identified along the lines of the criteria from the analysis.³⁷³

6.1 Legal requirements

In terms of legislation, REITs do not have a uniform legal structure within the EU as seen from the comparative analysis above.³⁷⁴ Within the range of legal forms eligible under MSs REIT regimes understanding exist for a REIT regime possible of capital market viability.³⁷⁵ Consequently, MSs regimes³⁷⁶ require REITs to be established using the form of a regulated vehicle.³⁷⁷ Regulated, however, is not limited to vehicles that are under the supervision of a financial authority but are at last “regulated” indirectly by a stock exchange. Vehicles that can be summarised under the definition above are usually public company forms based on shares, which can be traded at the stock exchange. Thus, a legal form of any corporate whereby the capital of which is divided into shares is of the “common understanding” for a (European) REIT in MSs regimes³⁷⁸ providing for statutory capital at some €15mn considering a mathematical mean level in between the MSs regime requirements.³⁷⁹

Based on MSs domestic corporate laws residency as well is required domestically in the certain MSs where the REIT is incorporated.³⁸⁰ Considering that some of the regimes are pure tax regimes rather a new type of a corporate even regimes allowing for residency in either MS often require the REIT to provide for a permanent establishment domestically though. The capital market orientation MSs REIT regimes are reflected by having the requirement for a mandatory stock listing to be eligible to qualify for REIT status.³⁸¹ Mandatory listing builds a “common understanding” in between the MSs and their REIT regimes, but must not be limited to the respective domestic stock(s) only rather may be organised at

³⁷³ See Sec. 5 above.

³⁷⁴ Ibid.

³⁷⁵ See Pfnür/Müller (2010), p. 698.

³⁷⁶ Except for the L-REIT, see Sec. 5.1.2 above.

³⁷⁷ See Tables II.5.1-1 and II.5.1-2.

³⁷⁸ See Sec. 5.1 above.

³⁷⁹ See Tables II.5.1-1.

³⁸⁰ Ibid.

³⁸¹ See Table II.5.1-2.

any regulated stock exchange in either MS or a signatory state to Treaties of the EU i.e. within the EEA and/or EFTA.³⁸²

Table II.6.1-1: Common understanding of legal requirements - overview

Requirement	Criteria	MSs Regimes*
Legal	Legal form	Corporation / Stock Company
	Share Capital	EURO 15m
	Registered Seat	domestic
	Listing	obligatory
	Stock Exchange	regulated stock in either MS/EEA
	Shareholder conditions	
	corporate holdings	max. 30%
	shareholding by individuals	min. 25 %
	free-float	min. 25 %
	voting rights	min. 25% by individuals
		max. 50 by corporate
* Based on "common understanding" for criteria		

Source: Original by W. Speckhahn

Furthermore, the legal requirements provide for shareholder conditions in order to safeguard that REIT are accessible for small investors and shares are possibly widely held.³⁸³ However, as a consequence of the fact that MSs regimes generally allow for a public REIT only, individuals at a maximum of 25% limit shareholdings to prevent majority holdings as to corporate shareholdings for a maximum of 30% and shareholdings.³⁸⁴ Furthermore, a free-float of REIT' shares is "understood" to be at a minimum of 25%.³⁸⁵ Herein, the rational behind limiting corporate shareholdings, thus, promoting small investors shareholdings and safeguarding for a sufficiently free-float, additionally, regimes provide for limits with respect to voting right alongside the shareholding at a maximum of 50% of voting rights by corporate shareholdings and a minimum of 25% held by Individuals.³⁸⁶ Finally, there is already a "common understanding" with regard to the legal requirements to identify that shall reflect the possible legal requirements for a "European" REIT model already. Thus, a (European)REIT shall be established as a public limited company on shares providing for a share capital of EURO 15mn and is obligatorily to list at a regulated stock exchange in either MS or the EEA region. There shall, furthermore, be shareholder conditions setting limits for shareholdings by

³⁸² See Sec. 5.1.2 above.

³⁸³ See Table II.5.1-3.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

corporate at 30% as well as their voting rights a maximum of 50% though. Individuals shall assist individual shareholdings with the requirement for minimum shareholdings at 25% and respective level of voting rights aligned thereto. The same threshold shall be secured for free-float at 25% though.

6.2 Operating activities

There is a “common understanding” identified to the operating activities for passive property investment to qualifying for REIT activities only.³⁸⁷ Passive investments comprise of the acquisition and sale of immovable property³⁸⁸ as well as its leasing and management of the portfolio.³⁸⁹ Compared to listed real estate companies and its value creating activities trading focused business models or development activities are not qualified activities for a REIT.³⁹⁰ This “common understanding” finds its confirmation with the rules as to any ancillary activities that are allowed but limited for own assets.³⁹¹

Table II. 6.2-1: Common understanding of operating activities - overview

Requirement	Criteria	MSs Regimes*
Operating activities (Passive property investments)	Acquisition and Sales	qualified
	Leasing	qualified
	Ancillary activities	qualified, for own assets
	Development	qualified, for own assets
* Based on “common understanding” for criteria		

Source: Original by W. Speckhahn

6.3 Status

With regard to the Status of MSs REIT regimes there is a very similar if not joint approach towards the conditions as to Asset, Income, Gearing and Distribution test extant.³⁹² Thus “common understanding” is identified for the set of conditions for Status of a (European)REIT providing under the Asset test for a minimum of 75% of qualifying assets of immovable property type from which with respect to

³⁸⁷ See Sec. 5.2 above.

³⁸⁸ See Definition according to Art 6 II OECD-Model (2012).

³⁸⁹ See Table II.5.2-1.

³⁹⁰ See i.e. by the introduction of minimum holding periods (SICAFI, SOCIMI), a maximum to the total GAV (L-REIT, G-REIT, SIIC, REIC) or both (UK-REIT).

³⁹¹ See Sec. 5.2 above. However, where income is generated out of any activities in excess of limitations set or from non-qualified activities is not eligible for tax transparent treatment of REIT' income.

³⁹² See Table II.5.3-1 and Table II.5.3-2.

the Income test a minimum of 75% of income must be generated. The use of leverage under the Gearing test shall be limited to maximum of 60% from a total portfolio point of view (GAV). The distribution test requires a quota at a level of 90% minimum distribution annually to the shareholders.

Table II. 6.3-1: Common understanding of status - overview

Requirement	Criteria	MSs Regimes*
Status	Asset Test	min. 75%
	Income Test	min. 75%
	Gearing Test	max. 60%
	Distribution Test	min. 90%
* Based on "common understanding" for criteria		

Source: Original by W. Speckhahn

6.4 Tax Treatment

The analysis of the tax treatment by MSs REIT regimes has shown that there is for "better of for worse" a joint understanding, thus the different regimes apply very similar if not the same model.³⁹³ Distinction is made in between the treatment of the domestic (resident) REIT and the foreign (non-resident) REIT. With the latter situation of cross-border activity by a foreign REIT there are mainly two situations to find either the direct investment in domestic real property or the indirect investment by way of shareholding in a domestic REIT.³⁹⁴

6.4.1 Domestic REIT

Since the tax transparency was already outlined as being one of the core features for a "true" REIT regime generally all MSs regimes follow this concept.³⁹⁵ Income at the level of the REIT provided and to the extent the income is derived from qualifying activities is not subject to income tax. This qualified income is tax exempt and will be taxed at the shareholder level at the respective individual tax rate applicable for a certain shareholder.³⁹⁶ The same holds true for the treatment of capital gains as well where almost all regimes do not levy tax on these gains even if this treatment may be subject to the further condition to accrue or reinvest such profits though.³⁹⁷

³⁹³ See Table II.5.4-1.

³⁹⁴ Ibid.

³⁹⁵ Ibid.

³⁹⁶ See Sec. 5.4.2 (1) above.

³⁹⁷ See Sec. 5.4.2 (2) above.

With respect to the tax treatment there is a “common understanding” identified for tax transparent treatment at the (domestic) REIT level for income tax as well as capital gains tax in full.³⁹⁸

6.4.2 Foreign REIT

Further, “common understanding” is identified as to the treatment of any distributions made for the benefit of a foreign shareholder in a domestic REIT. MSs regimes all follow a similar path and levy withholding tax to the distributions made to the non-resident shareholder, either individual or corporate.³⁹⁹ This understanding holds true for all of the qualifying income, though non-qualifying income generally will not benefit from the tax exemption.⁴⁰⁰ Even though MSs do not levy any withholding tax and with other MSs regimes tax rates differ, however, not significantly, there is “common understanding” identified for a withholding tax rate at 20%.⁴⁰¹

Generally, under all regimes levying withholding tax it may be lowered if not totally avoided in case where a DTT was conclude in between the relevant MSs or the Parent-Subsidiary-Directive applies, thus, possibly leading to a de facto tax exemption though.⁴⁰² In between all MSs there are respective DTT’s in place that are based on the OECD Model Treaty.⁴⁰³ Generally, foreign shareholders will, therefore, generally benefit from a tax credit, relief *et al.* However, there may not be compensation in full since there is a “common understanding” for an applicable tax rate at a maximum of 20%, which exceeds a possible i.e. credit at a rate of 15% only. Thus, since the withholding tax rates are usually higher than 15%, there is effectively taxation of dividends distributed to the foreign (corporate) shareholder though.⁴⁰⁴

³⁹⁸ See Table II.5.4.1.

³⁹⁹ Ibid.

⁴⁰⁰ See Sec. 5.4 above.

⁴⁰¹ See Sec. 5.4.3 (1) above.

⁴⁰² Ibid. See Table II.5.4-1.

⁴⁰³ See OECD Model (2012).

⁴⁰⁴ See Sec. 5.4.3 (1) above, and Table II.5.4-1.

Where the foreign REIT decides to invest direct cross-border in real property in the territory of another MS the foreign REIT will not benefit from the beneficial tax treatment. There is “common understanding” identified that the foreign REIT is not eligible as a foreign corporate to opt for the domestic REIT regime of the Host State.⁴⁰⁵ Rather, “common understanding” is the treatment of profits to be repatriated from the domestic level of its source to the foreign REIT in another MS such income is subject to the ordinary treatment for non-resident corporate. The tax is levied at a rate at 20% accordingly. A possibility for lowering the tax levy is subject to the application of a DTT or the Parent-Subsidiary-Directive as outlined above though.⁴⁰⁶

6.4.3 REIT taxation

There is “common understanding” in between MSs that the domestic REIT is treated fully tax exempt for income and capital gains tax, whereas, the foreign REIT operating cross-border, either direct or indirect, does not benefit from this tax transparency. The beneficial tax treatment under the domestic REIT regime shall not be eligible though. Thus, dividend payments received from a domestic REIT shall be levied with withholding tax and income generated from direct investments in real property shall not flow-through to the foreign REIT rather be taxed according the ordinary treatment for non-resident corporate income though.

Table II. 6.4-1: Common understanding of tax treatment - overview

Requirement	Criteria	MSs Regimes*
Tax treatment	Domestic REIT	tax transparent treatment
	income tax	tax exempt
	capital gains tax	tax exempt
	Foreign REIT	
	Indirect investment	
	foreign shareholder	max. 20% withholding tax
	Direct investment	
	domestic regime eligible	not eligible
	tax treatment	ordinary treatment for non-resident corporate
* Based on “common understanding” for criteria		

Source: Original by W. Speckhahn

⁴⁰⁵ Even though the FBI and SIIC provide for the option to apply for the domestic regime this possibility would result in the set-up of a subsidiary REIT under the domestic regime and, thus, does not reflect a case of a the recognition of a foreign corporate under the domestic regime as such (see Sec. 5.4.3 above).

⁴⁰⁶ Ibid.

6.5 Sanctions

As it resulted from the analysis sanctions are existing on the level of penalties only and/or the level of the loss of status.⁴⁰⁷ The specificities for certain facts leading to either consequence varies that a determination of a “common understanding” is not selective in its details. However, “common understanding” is existent to the extent that any violation of single regime conditions leads generally to penalties only which are imposed by way of additional tax burdens. Whereas, it is “common understanding” identified as well that any constant or systematic breach of regime conditions lead to a loss of status though.⁴⁰⁸

Table II. 6.5-1: Common understanding of sanctions - overview

Requirement	Criteria	MSs Regimes*
Sanctions	violation of single regime conditions	Penalty
	constant / systematic breach of regime requirements w/o reasonable cause	Loss of status
* Based on “common understanding” for criteria		

Source: Original by W. Speckhahn

6.6 Common understanding of a European REIT

It is to conclude that even though MSs REIT regimes are not harmonised, they share a joint understanding of the key criteria for a REIT regime. Moreover, there is not only a joint understanding of the principles as such rather similar concepts and rules have been used and views that are shared rather a “common understanding” identified providing for a level playing field that serve for the nucleus of the discussion towards the foundation of a “EuroREIT”. The “common understanding” identified provide for clear conditions not only to the key criteria of a REIT but for detailed concepts as well.⁴⁰⁹

Table II. 6.6-1: Common understanding of the “European REIT” - overview

Requirement	Criteria	MSs Regimes
Legal	Legal form	Corporation / Stock Company
	Share Capital	Euro 15m
	Registered Seat	domestic
	Listing	obligatory

⁴⁰⁷ See Sec. 5.6 above.

⁴⁰⁸ See Table II.5.5-1.

⁴⁰⁹ See Table II. 6.6-1.

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REITs in the EU

	Stock Exchange	regulated stock in either MS
	Shareholder conditions	
	corporate holdings	max. 30%
	shareholding by individuals	min. 25 %
	free-float	min. 25 %
	voting rights	min. 25% by individuals
		max. 50 by corporate
Operating activities (Passive property investments)	Acquisition and Sales	qualified
	Leasing	qualified
	Asset Management	qualified, for own assets
	Development	qualified, for own assets
Status	Asset Test	min. 75%
	Income Test	min. 75%
	Gearing Test	max. 60%
	Distribution Test	min. 90%
Tax treatment	Domestic REIT	tax transparent treatment
	income tax	tax exempt
	capital gains tax	tax exempt
	Foreign REIT	
	Indirect investment	
	foreign shareholder	max. 20% withholding tax
	Direct investment	
	domestic regime eligible	not eligible
	tax treatment	ordinary treatment for non-resident corporate
Sanctions	Penalty	violation of single regime conditions
	Loss of status	constant / systematic breach of regime requirements w/o reasonable cause

Source: Original by W. Speckhahn

The European REIT according to the “common understanding” identified may be established with the legal form of a public limited company having a share capital of min. Euro 15mn with its seat in the MS of its tax residency.⁴¹⁰ The listing of the company is obligatory; however, there is flexibility as to the stock for listing that may be any regulated stock in either MS or in the EEA region.⁴¹¹ Consequently, in order to be eligible to opt for the (domestic) REIT status and to benefit from tax transparent treatment domestic presence and stock listing can be called “common

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

understanding” in between MSs and its regimes. In order to safeguard for the smaller investor to taking part as shareholder in a REIT company corporate shareholding shall be limited to max. 30%, whereas, the regime shall require the company to comprise at least 25% of shareholdings by Individuals, therefore the free-float of shares shall be at a minimum at the same level of 25% though. Furthermore, whereas the voting rights for Individuals shall be at minimum 25% they must not exceed a quota of 50% for corporate shareholdings.⁴¹²

The operating activities shall comprise of passive investments into immovable property only. Core activities hereto i.e. acquisition and sale as well as leasing of property are qualified activities that shall count for at least 75% of the asset activities (Asset test) and be reflected at the same amount in the income of the REIT (Income test). Further activities, such as asset management as well as development activities shall be qualified activities but limited to wards own assets only. Moreover, the REIT is limited in using leverage at a maximum of 60% of the GAV and must distribute its profits to its shareholders at a minimum of 90% on an annual basis.⁴¹³

The tax treatment of the European REIT follows the tax transparent treatment that is any income flow-through to its shareholders and will be taxed in their hands at personal tax rate⁴¹⁴ only. Understanding is given for the foreign shareholder in a domestic REIT and the foreign REIT operating directly cross-border as well. The European REIT shall levy withholding tax prior to the distribution of dividends to the non-resident shareholder, either corporate or individual. With the remainder of its activities in the Host State the European REIT will face ordinary treatment for the non-resident corporate though.⁴¹⁴

Lastly, the European REIT shall be in compliance with the regime requirements during the full fiscal year in order to prevent to being sanctioned. Sanctions may be possible in case of the violation of inle regime conditions with penalties i.e. additional tax payments on i.e. non-qualifying portions of income that have been generated in excess of the limitations set for the operating activities. However, the

⁴¹² See Table II. 6.6-1.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

loss of status may occur where the REIT constantly and systematically is in breach of regime requirements though.⁴¹⁵

7. Comparison US REIT vs MSs REITs

Even though the “common understanding” identified in the previous section represents the “least common understanding” shared between MSs it reflects a level of possible agreement already, building ground for the harmonisation of MSs REIT regimes leading to a jointly recognised REIT regime for the EU which may be called a “European REIT model”⁴¹⁶ or “EuroREIT” already.⁴¹⁷ With regard to the research question whether the EU has impacted MSs REIT regimes a question is to answer a to which extent the US-REIT was used as a “model” by MSs and, thus, its impact on MSs REIT regimes. The identification of similarities enables the researcher to identify *causal* relationship in between the criteria of the REIT regimes. Therefore, the comparison of the US-REIT “model” *versus* the European REIT in the version of the “common understanding” sets the basic understanding for any impact on MSs REIT regimes whether influenced by the US-REIT and/or the EU.

Table II.7-1: Comparison: The “classic” US-REIT model v. MS REIT regimes - overview

Requirement	Criteria	US REIT	MSs Regimes*
Legal	Legal form	Corporation (LLC,/LLP), Association or Trust	Corporation / Stock Company
	Share Capital	no minimum requirement	Euro 15m
	Registered Seat	domestic	domestic
	Listing	not obligatory	obligatory
	Stock Exchange	domestic	regulated stock in either MS
	Shareholder conditions	min. 100 shareholders max. 5 single holdings own >50%	min. 25 % free float
			max. 30% corporate holdings voting rights max 25% by Individuals / max 50% by Corporate
Operating activities (Passive property investments)	Acquisition and Sales	qualified	qualified
	Leasing	qualified	qualified
	Asset Management	qualified for own assets	qualified, for own assets

⁴¹⁵ See Table II. 6.6-1.

⁴¹⁶ See Lewis (2010), p.4-7.

⁴¹⁷ See Pfnür/Müller (2010); Hughes/Lewis (2008), p. 88-97.

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE

REITs in the EU

	Development	qualified for own portfolio	qualified, for own assets
Status	Asset Test	min. 75% of real estate, bonds or cash	min. 75% qualified investments
		max. 5% "bad income"	
		max. 10% shares in another REIT	
		max. 20 in TRS	
	Income Test	min. 75% from real estate	min. 75% qualified income
		min. 95% incl. bonds and cash	
	Gearing Test	max. 60%	max. 60% (average)
	Distribution Test	90%	min. 90% (average) annually
Tax	REIT Level	Tax exempt if distributed	qualified income tax exempt
	Capital Gains	Tax exempt if distributed	tax exempt
	Withholding Tax	Generally 30% but may be reduced to 15% in DTT case	max. 20% (average)
Sanctions	Penalty	violation of single regime conditions	
	Loss of status	constant / systematic breach of regime w/o requirements	reasonable cause
* Based on "common understanding" for criteria			

Source: Original by W. Speckhahn

Comparing the US-REIT "model" and its criteria with the version of the "common understanding" of MSs REIT regimes similarities, if not equalities, are visible. There is a clear joint understanding with regard to the "cornerstones", which create the international standard for REITs that are "Distribution" and "Tax transparency".⁴¹⁸ MSs REIT regimes follow the requirement for the distribution of profits almost in full to the shareholders on an annual basis at a level of 90% and, thus, sharing the requirement of the US-REIT. Furthermore, there is joint understanding for tax transparency at REIT level shifting the taxation of income to the level of the shareholder only. Furthermore, both regimes share the understanding to treating non-domestic shareholders different to domestic ones by excluding them from the transparent treatment applying withholding tax on dividend payments though.

For the remaining criteria, there is joint understanding as well⁴¹⁹ except, however, for the legal requirements. The most important difference is seen with the criteria

⁴¹⁸ See Table II.7.1.

⁴¹⁹ Ibid.

for stock listing. There is common understanding within MSs REIT regimes setting the requirement for public REITs only, whereas a listing is not obligatory for the US-REIT though and may be established as private REIT as well. Furthermore, in case a US-REIT is a public REIT listing is required at a domestic stock only. However, this shall not be a difference in the sense of term, since the “domestic” market for the USA is their internal market, whereas, the “internal market” in the EU comprise the territory of all MSs, therefore, the listing at “any regulated stock in either MS” is a comparable requirement in this respect though. Furthermore, differences in details extant with a view to the Shareholder Conditions may not create a substantive difference a such, rather reflect similar ideas i.e. providing for a minimum of free float and limiting single shareholdings. Thus, different solutions in details within ranges of a general joint understand though. Therefore, it is valid to conclude that all MSs have orientated themselves on the US-REIT model while establishing their REIT regimes. Even though the US-REIT was not simply used as a “blueprint” overall the similarities of all MSs REIT regimes with the “classic” US-REIT are clearly identifiable.⁴²⁰ Whether this proof for almost exclusive impact by the US-REIT, thus, excludes any impact by the EU is not a valid summary though. Even where impact seems to be extant i.e. with focus on the tax treatment, these rules may be a logic result of MSs’ tax sovereignty and their fear of loss of tax base having resulted in rule providing for withholding taxation for non-domestic shareholders and the respective dividend distributions though. Anyways, any impact of the US-REIT model will finally become visible once the impact of the EU is identified in the following chapters.

8. Conclusion - Emergence of a standard

The comparison of the existing 13 MSs REIT regimes has shown no single European REIT Model yet. The detailed comparison of criteria has shown a wide spectrum of regulations where strict restrictions with complex single purpose rules are facing liberal requirements. MSs regimes vary in the EU because of local conditions and legal and tax framework.⁴²¹ Differences, however, are not based on a different understanding of the ideal REIT vehicle, but reflect divergent MSs domestic legal system and tax sovereignty, seen in particular in the tax treatment

⁴²⁰ See Table II.7.1.

⁴²¹ See Annex 1.

of foreign shareholders in a domestic REIT, and treatment of income generated by a foreign REIT in another MS. There is clear “common understanding” between MSs REIT regimes in the least common denominator of each of the criteria in the structured framework, creating a kind of “European REIT”-model. Rather, classical instruments to safeguard its tax base by way of applying withholding tax and rules for the ordinary treatment of non-resident corporate are applied.⁴²² Thus cross-border activities are hindered, and fundamental freedoms of the internal market in the EU may be being violated.

There is impact from the US-REIT model, but MSs REIT regimes follow local conditions and legal and tax framework. The development of European REITs shows that their success follows similar concepts, common structures and requirements. A “common understanding” can certainly represent a EU model of best practice with potential for a harmonised model for a “EuroREIT”.⁴²³

The next chapter analyses MSs REIT regimes in the context of “hard” law.

⁴²² See Table II.7.1.

⁴²³ Thus, they are votes in Literature that MS regimes are far from being harmonised though (see Cornelisse (2006 Part 2), p. 75).

Section 2 –

Mechanism of Europeanization:

“Goodness of Fit” and Adaptational Pressure

This section is grouped around the policy impact of the EU with focus on the mechanisms used by the EU. Basis was built in the previous chapter with the European REIT model based on the “common understanding” identified. In order to analyse the impact of the EU on MS REIT regimes, this REIT model of “common understanding” is to analyse with respect to applicable EU law. The discussion around REIT regimes in the EU does not only impact tax laws, but company laws of the MS too as it was seen in the previous chapter. Taking up the suspicion raised that MS REIT regimes are in violation of some of its details with regard to EU law, this chapter is to identify the statutory framework applicable to the goodness of fit test and to analysing adaptational pressures therefrom. Therefore, this chapter focus on EU policies that may be described as “hard”, that are the Treaty and compulsory directives and regulations though. The identification of such hard policies will provide the basis to the understanding of the impact of the EU providing input into MSs domestic policy structures through negative integration. Negative integration is, beside positive integration⁴²⁴, “... most indicative of “top-down” Europeanization, where the EU legislation triggers adaptational pressure and subsequent (potential) change”.⁴²⁵ Herewith, MS are obliged to respond to EU legislative input into their domestic systems, that is the potential Europeanization effects result from the legal obligation to comply with EU law. Therefore, the following Chapter IV focus on the identification of the relevant “hard” policies followed by Chapter V, which is about identifying ECJ case law applying EU “hard” law leading to the identification of suspect rules in MS REIT regimes, thus, resulting in adaptational pressure to MS to adjust its domestic regimes, thus negative integration is involved.

⁴²⁴ Negative and positive integration equally representing examples of top-down Europeanization.

⁴²⁵ See Radaelli (2010), p. 181.

Chapter III: MSs REIT Regimes and EU law

1. Objectives for this Chapter

REITs have emerged in the EU showing the desire for market transparency and the elimination of barriers to entry.⁴²⁶ Real Estate investors have traditionally limited their investments to local markets,⁴²⁷ but development is taking place in real estate⁴²⁸ for investing cross-borders "... involving the transfer of capital to undertake business activities..."⁴²⁹ as is the case of cross-border investments in real property. This development is assisted by the liberalisation of trade⁴³⁰, interregional investments compared to intraregional investment, indicating that (global) investors are venturing beyond their territories.⁴³¹ The success of REITs is catalysed by its beneficial tax treatment becoming a location factor for investor' investment planning.⁴³² Tax and corporate laws of MSs are dominated by national imprint, and domestic tax marking national sovereignty reflecting MS' economic and social politics,⁴³³ and a uniform REIT regime does not exist in the EU exist.⁴³⁴ Rather, the legal treatment of REITs in MSs is far from being harmonised and no "one fits all" regime,⁴³⁵ but "common understanding" of the core criteria' of a REIT regime is extant.⁴³⁶ The existence of common understanding, however, has no say about the quality of this understanding whether being in compliance with applicable supranational laws i.e. EU law. The existence of a "common understanding" might not be a case for harmonisation, rather differentiation. Thus, fields of conflicts are obvious and rules for resolution are of interest. In the context

⁴²⁶ See Treaty Establishing the European Economic Community, March 25th, 1957, 298 U.N.T.S. 11, 16 (1058), the so-called Treaty of Rome (hereinafter the "Treaty").

⁴²⁷ See Brown (2003), p. 289.

⁴²⁸ See above Chapter II.

⁴²⁹ See Harrison (2000).

⁴³⁰ This allows free flow of goods, services and capital, and technological changes in communication and transportation allowing the movement of capital between countries. For a more detailed account of the factors of globalisation of international business, see Hill (2002).

⁴³¹ See Lachmann (2005), p. 11; Chen/Mills (2006), p.28.

⁴³² See Hatje (2006), p. 9.

⁴³³ See Chapter II, Sec. 5 above; Hatje (2006), p.9.

⁴³⁴ See Chapter II, Sec. 5.6.

⁴³⁵ Ibid, with further reference to i.e. Cornelisse (2006 Part 1), p. 4, Hughes/Lewis (2008), p. 95.

⁴³⁶ See above Chapter II, Sec. 6.

of the Union and its Members EU law builds the framework for the competences of MSs and the EU, providing a statutory framework with the Treaty as its primary source, its objective, the “internal market”, and the freedoms as guiding principles to achieving its objective. Here, collision to applicable domestic law, building a framework within the sovereign domestic legislator acting independently, may limit its sovereignty.⁴³⁷ Therefore, this chapter is about:

- to define the constituent framework of EU law⁴³⁸ building the framework for MSs and its REIT regimes, thus, relevant for compliance;
- to provide an overview of sources of EU law building the framework to each of the requirements of REITs from primary EU law;
- the identification of Treaty Freedoms applicable to the specific areas of tax and company law in cross-border situations; and
- to include in the analysis, furthermore, additional secondary EU law and other connecting laws like international company law.

As a result this chapter provide for the framework of EU law applicable in the case of MSs REIT regimes using the model of “common understanding” with focus to the legal requirements (company law) and (direct) tax treatment rules in order to identify EU law applicable to MSs REIT regimes building basis for the “goodness of fit” test.

⁴³⁷ Example hereto is i.e. with the Finish F-REIT for which the finish government was to seek for the approval by the EU Commission to establish its REIT focussing on residential real properties only (Property Week Global (2010)). The Commission has authorized under EU state aid rules the introduction of REITs in Finland that is aiming to encourage investment in affordable rental housing only. However, after respective assurances by the Finish government the Commission was satisfied that the regime does not involve state aid as any profits made by the REIT will be subject to tax at shareholder´ level very much like the profits made by individual investors investing directly in the real estate market. This, because the exemption from corporate income tax is linked to the requirement of immediate distribution of annual profits to shareholders, at the hand of which taxation takes place. Thus, this mechanism puts the tax treatment of an investment in a REIT at par with the taxation of direct investments by individuals in real estate (see eubusiness.com (2010); Liinanki (2008)).

⁴³⁸ This thesis focuses on EU law in its essential sense that is the Treaty of the European Union in its post-Lisbon version, which goes back to the Treaty of Rome of 1957 on the European Economic Community and its legal system. Thus, the provisions provided by the European Convention on Human Rights (ECHR) of the European Council are carved out. Here, importance in the context of tax laws increases but sets legal subject that is to separate (see Baker (2000), p. 298).

2. Source of EU law – Primary European law

The Treaty upon which the EU is founded provides the “benchmark” with which MSs REIT regimes must comply. Even in case of no express competence for the EU and original competence stayed with its MS they

*“... must ... exercise (their) competence consistently with Community law.”*⁴³⁹

Therefore, the Treaty⁴⁴⁰ is considered to be the primary source of EU law.⁴⁴¹ The basis of any other legal action must be founded on a Treaty provision. The Treaty and its regulations are securing for the establishment and safeguarding of internal market. Thus, the Treaty provisions are considered “primary EU law”⁴⁴² and as such are supreme. This results from the objective of the Treaty. When the EU was established, it required a transfer of sovereignty for certain specific areas of policy from the MS to the EU.⁴⁴³ This meant that some legal matters that had been the sole prerogative of a MS were no longer within its control.⁴⁴⁴

The question is, whether there are grounds for competence existing within the Treaty in the relevant fields of interest with REITs going cross-border. Hereto, focus is to the fields of corporate law and taxation. Along the criteria for REITs according to MSs regimes the provisions identified of being suspect to infringe EU

⁴³⁹ See e.g. Case C-80/94, “G.H.E.J. Wielockx v Inspecteur van der Directe Belastingen” (Case “Wielockx”), (1995), ECR I-2493, para 16.

⁴⁴⁰ The “Treaty” is meant to be the three founding “treaties” of which the EU is build on that are (1) the Treaty of Paris establishing the European Coal and Steel Community (ESCS) of 1952 and the two Treaties of Rome (2) establishing the European Atomic Energy Community (EURATOM) and (3) the European Economic Community (EEC) of 1958, thus since the Merger Treaty 1965 the “European Community” in its revised version according to the Single European act of 1986, and the Treaty of Amsterdam (1999), the Nice Treaty, February 2003), the Maastricht Treaty (November 2003) and lastly the Lisbon Treaty (2009).

⁴⁴¹ The ECJ considers the Treaty being an independent legal framework with its own legal principles different from other public international law (see Cordewener (2004), p. 6).

⁴⁴² Where the Treaty serves as the enabling act, then what is required is the equivalent of delegated legislation. Hence, acts established by the legislative institutions⁴⁴² of the EU are considered to be “secondary EU law”. These are listed in Article 249, which are regulations, directives and decisions. Although recommendations and opinions are mentioned, these are not legally binding.

⁴⁴³ See Case C-26/62, “Van Gend en Loos (NV Algemene Transport-en Expeditie Onderneming) v Netherlands Administratie de Belastingen” (Case “Gend & Loos”), (1963), ECR 00001.

⁴⁴⁴ See Case C-6/64, “Costa v ENEL” (Case “ENEL”), (1964), ECR 585.

law in the previous section will be analysed including especially REIT conditions as to legal requirements and tax treatments.

2.1 Sources for “Legal requirements”

The legal requirements of MSs REIT regimes deal with criteria such as the legal form for REIT companies and their residence as well as listing requirements and shareholder restrictions. Those conditions are relevant in the corporate laws of MSs. Hereto, MSs have not transferred expressed competence to the EU other than the general competence for activities to establish a common internal market, Art. 2 and 3. However, these competences by Art. 3 does not include exclusive competence for corporate laws to the EU, rather, this competence is subsidiary to MSs taking activities themselves.⁴⁴⁵

However, with regard to discrimination there are standard legal norms provided by the Treaty, which *inter alia*⁴⁴⁶ is the general prohibition of discrimination based on residence (Art. 18) providing important ground for assessing MSs conditions for legal requirements though. Unfortunately, Art. 18 is broad in the scope of the Treaty while prohibiting “... any discrimination on grounds of nationality ...”, thus prohibits the discrimination of nationals from other MSs.⁴⁴⁷ It should, however, be noted that Art 18 applies independently to situations governed by EU law only for which the Treaty lays down no specific rules of non-discrimination.⁴⁴⁸ This order for “equal treatment of nationals” is, however, already implicit in the economic freedoms of the Treaty representing its least common understanding. Thus, where

⁴⁴⁵ The so-called “Principle of Subsidiary” is laid down in Art. 5 expressively. For activities towards mutual recognition of companies the principle of subsidiarity becomes visible i.e. with Art. 293. Here, the Treaty expressively allocates activities within the field of corporate law that is the recognition of companies throughout the EU in the hands of the MS asking for their negotiations in between themselves. Thus, activities in this field and a competence for the EU to act will be of secondary law nature only that is by way of regulations, directives and decisions as provided for with Art. 249.

⁴⁴⁶ Beside the Non-Discrimination there are further standard legal norms provided by the Treaty with relevance to tax law that is the free movement of private individuals (Art. 21 I) that is linked to the Citizenship of the Union (Art. 20). Hereto, the ECJ has declared this norm subsidiary to the fundamental freedoms even though the norm has a scope independent from the freedoms though (see Case C-413/99, “Baumbast and R. v. Secretary of State for the Home Department”, (2002), ECR I-7091, para 76). Thus, private individuals might rely on this norm while experiencing tax disadvantageous in the context of the change of residence on grounds of private reasons.

⁴⁴⁷ See Lenz (2003), Art. 12 (pre-Lisbon numbering), recital 2 et seqq.

⁴⁴⁸ See Case C-25/10, “Missionswerk Werner Heukelbach eV v État Belge” (Case “Missionswerk”), (2011), ECR I-00497, para 18 with further reference to Case C-311/08, “SGI”, (2010), ECR I-0000, para 31 and Case “Schmelz”, (2010), ECR I-10465, para 44.

and when the economic freedoms i.e. the freedom of establishment and the freedom of movement of capital are applicable they provide specific rules on non-discrimination⁴⁴⁹ there is no room left for the application Art. 18 i.e. in the context of tax laws and Art 18 does not apply.⁴⁵⁰

2.2 Sources to "Taxation" - EU competence v. MSs sovereignty

Different situation is with competences in the field of taxation. Economic policy i.e. tax and trade policy is of competence with the MSs only.⁴⁵¹ Therefore, the Treaty is silent in the Articles under Title 1 "Categories and Areas of Union Competence"⁴⁵² on tax policy and to any competence for the Commission on neither its harmonisation nor the abolishment of discriminating tax measures are mentioned within the aims and objectives of the Treaty.⁴⁵³ However, the Treaty provide under Title VII⁴⁵⁴ in its Chapter 2 for "Tax Provisions"⁴⁵⁵ expressively though. These provisions deal with "...the harmonisation of legislation concerning ... indirect taxation ..." ⁴⁵⁶ only but not for direct taxes.⁴⁵⁷ This is because tax policy falls under the principle of subsidiarity towards the fiscal autonomy of the MSs. Nevertheless, the second type of provisions regards general prohibitions for MSs to establish or maintain obstacles to intra-Community movement and trade. Therefore, even in areas with sovereign competence by MSs and that are not harmonised, like direct taxation, MSs are bound to respect their general commitment to Community loyalty under Art. 2, thus,

*"... although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law".*⁴⁵⁸

⁴⁴⁹ See i.e. Case C-422/01, "Försäkringsaktiebolaget Skandia (publ), Ola Ramstedt v Riksskatteverket" (Case "Skandia") (2003), ECR I-06817, para 61.

⁴⁵⁰ See Cordewener (2004), p. 9; Case "Missionswerk", para 19.

⁴⁵¹ See Wieland (2001), p. 119.

⁴⁵² See Articles 2 – 6.

⁴⁵³ See Oppermann (2005), p. 359.

⁴⁵⁴ "Common Rules On Competition Taxation and Approximation Of Laws".

⁴⁵⁵ See Art. 110 – 113.

⁴⁵⁶ MSs competences are exclusively in the field of indirect taxation i.e. for value added tax and excise duties (see Commission (1985), para 163).

⁴⁵⁷ See Art. 113.

⁴⁵⁸ See e.g. Case "Wielockx", para 16; Case C-279/93, "Finanzamt Köln-Altstadt v Schumacker" (Case "Schumacker"), (1995), ECR I-225, para 21; Case C-264/96, "Imperial Chemicals Industries

In particular, national direct tax provisions (including international tax conventions) must not compromise the freedoms enshrined in the Treaty. Therefore, direct taxation i.e. by way of corporate income and withholding taxation, is not of competence of the EU but stays within MSs sovereignty only. Thus, again tax regimes of MSs as well as their regulations and treatments have to comply with the Treaty and its internal market objective to which the Freedoms building a source to analysing suspect tax regulations.⁴⁵⁹ In Addition, tax regimes may be suspect in light of other Treaty provisions i.e. the state aid rules according to Art. 107 et seqq. A regime that provide for tax exemption for a certain undertaking may be viewed as being “selective” in terms of the state aid rules and, thus, being incompatible with the internal market in so far as it affects trade between the MSs. Therefore, any tax exempt regime is potentially suspect of running the risk of breaching state aid rules and must be analysed in light of Art. 107 et seqq.

As far as “EU Tax law” is concerned one talks about national and bilateral non-EU law of or between MSs, which are the national tax laws, and bilateral treaties i.e. DTT’s. As a consequence supranational non-EU law plays no practical role within what is called EU tax policy. EU tax policy is a result of competences MSs have transferred to the EU with their accession and making use of these transferred competences affects the fiscal autonomy of ones MS essentially. These competences can be found in the Treaty’s Articles to Competition⁴⁶⁰, Discrimination⁴⁶¹ and the four Freedoms⁴⁶². As soon as the EU acting on these

plc (ICI) v Colomer” (Case “ICI”), (1998), ECR I-4695, para 19; Case C-311/97, “Royal Bank of Scotland plc v Elliniko Dimosio” (Case “RBS”), (1999), ECR I-2651, para 19.

⁴⁵⁹ There are, however, further legal bases potentially of tax law relevance that are contracts annexed to the Treaty i.e. the contract with the European Free Trade Area (EFTA) on the European Economic Area (EEA) (see for its relevance for tax laws Case C-321/97, “Andersson et al”, (1999), ECR I-3551) as well as Treaties concluded by the EU based on Art. 217 the so-called “treaties on association” with countries for accession or candidate to the EU and its provisions orientated in its content on the economic freedoms of the Treaty though (see i.e. on the freedom of establishment Cases C63/99, “R. v Secretary of State for the Home Department, ex parte Gloszuk and Gloszuk”, (2001), ECR I-6369 (Poland); C-235/99, “R. v Secretary of State for the Home Department, ex parte Kondova”, (2001), ECR I-6427 (Bulgaria); C-247/99, “R. v Secretary of State for the Home Department, ex parte Barkoci and Malik”, (2001), ECR I-6557 (Czech Republic); C-268/99, “Aldona Malgorzata Jany and Others v Staatssecretarissen van Justitie”, (2001), ECR I-8615 (Poland and Czech Republic).

⁴⁶⁰ See i.e. Art. 3 I lit. b) and especially those on State Aids in Art. 107-109.

⁴⁶¹ See Art. 18 et seqq.

fields the fiscal interests of the MSs are perplexed. Therefore, the Treaty limits the competences for the EU in its “tax provisions” in Art. 110 – 113. These Treaty provisions, which explicitly or implicitly refer to taxation find their justification in their contribution to Community policies, and in particular to the objective of the achievement of the internal market. There is, however, limited scope of action for the EU, which is the internal market, the fundamental freedoms and additional legislative competences.⁴⁶³ In order to create an internal market without internal “frontiers” being hindrances and obstacles for free trade in between the MSs the Commission is provided with the general competence to organise for the abolishment of obstacles to the internal market by taking measures necessary for the “...establishment and functioning of the internal market” in Art. 114 I. This competence is not unlimited but is focused to areas where the Commission has exclusive competence provided by the Treaty only.⁴⁶⁴ Art 3, however, does not provide such competence in the area of direct taxation though.⁴⁶⁵ But one has to consider that the Treaty clearly mandates the EU to the harmonisation of taxes as stated by Art. 113 (specific harmonisation of laws) to the extend “... necessary to ensure the establishment and the functioning of the internal market....”. That condition states again the principle of subsidiarity to activities of the EU but at the same time limits the principle to the extend that common aims under the Treaty call for and need activity by the EU as far as the principles of the EU⁴⁶⁶ cannot or not as sufficient be reached by MSs actions than by the EU directly.⁴⁶⁷

Having the above in mind the Treaty requires for indirect tax harmonisation but any measures in the field of direct taxation are not enfolded by Art. 113.⁴⁶⁸ However, harmonisation in this respect means the standardisation of corporate tax regimes as well as tax rates and bases in all MSs.⁴⁶⁹ Therefore, direct taxation appears to remain the prerogative of MSs their national sovereignty. This

⁴⁶² See Art. 28 et seq. on the free movement of goods, 45 et seqq. on the free movement of persons, 49 et seqq. on the right of establishment, 56 et seqq. on the freedom of services and 63 et seqq. of capital and 28 et seqq.

⁴⁶³ Hatje (2006), p. 10.

⁴⁶⁴ See Art. 3.

⁴⁶⁵ Furthermore, the Treaty does not provide any other competence in the field of direct taxation neither as part of the “share competence” of Art. 4, nor as “supportive” or “coordinative” actions within Art. 5 and 6.

⁴⁶⁶ See Art. 2.

⁴⁶⁷ See Art. 5.

⁴⁶⁸ See Schwarze (2007), p. 155.

⁴⁶⁹ See Nickson (2004), p. 182.

prerogative for the MSs finds its affirmation with Art 115 and its provisions for unanimity with decisions that are being made according to this rule. By providing for unanimous votes in order to take measures in the field of direct tax policies the core area of MSs sovereignty is confirmed.⁴⁷⁰ This does not mean that there is no subsidiary competence with the Commission at all. In addition there is competence according to Art. 115 for the approximation of tax laws as Schwarze⁴⁷¹ outlined. Here, the Council may upon recommendation by the Commission enact a Directive to the approximation of regulations of MSs where those have direct effect on the functioning of the common market. However, any measure whether based on Art. 113 or Art. 115 are subject to the unanimous approval by all MSs though.⁴⁷²

Thus, any measures by the MSs have to be compliant to the internal market objective of the Treaty and must, therefore, be free of any obstacles to the free movement of i.e. persons, services and capital.⁴⁷³ Therefore, even though there is no express source for activities in the Treaty they must be compliant with the Freedoms of the Treaty. Thus, the framework set by the Freedoms is considered as a source in this context.⁴⁷⁴

3. The fundamental freedoms

In the absence of harmonisation in the field of direct taxes, the MSs are "...at liberty ... to determine the connecting factors for the purpose of allocating powers of taxation ... between themselves."⁴⁷⁵ This does, however, not mean that MSs sovereignty is unlimited where there has not been a transfer of (even partial) competences to the EU.⁴⁷⁶ The ground on which EU law is based is the so-called

⁴⁷⁰ The attempt set by Germany and France to introduce for qualified majority vote failed with the negotiations for the EU constitutional contract of Lisbon (see Presidency (2003)).

⁴⁷¹ See Schwarze (2005), p. 155.

⁴⁷² See Schwarze (2005), p. 156.

⁴⁷³ See explicit wording of Art. 3 I lit. c) Treaty in its pre-Lisbon version, whereas the principle was moved post-Lisbon to Art. 26 II.

⁴⁷⁴ The objectives of the Freedoms and their applicability to the questions identified to MSs REIT regimes will be discussed further below separately in detail (see Section 3.2 below).

⁴⁷⁵ See Case C-307/97, "Compagnie de Saint Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt" (Case "Saint Gobain"), (1999), ECR I-6161, para 56.

⁴⁷⁶ Beside Art 54 that provides for the mutual recognition of companies the pre-Lisbon version of the Treaty express its expectation for the prevention of double taxation in Art. 293 2nd and 3rd indent that established ground for the MSs to assist harmonisation by entering into conventions. Any activities necessary for adaptation or harmonisation in these areas must be of priority for the

“internal market”-principle outlined with Art. 3 – 6 and Art. 26 in particular.⁴⁷⁷

According to Art. 26 II the internal market

“... shall comprise an area without internal frontiers in which the free movement of ... goods ... capital is ensured ...”.

However, this more general worded principle does not provide for a legally enforceable position. Therefore, reference must be taken to the Treaty and its economic freedoms i.e. the freedom of establishment (Art. 49) and the freedom of movement of capital (Art. 63). The scope of the freedoms is to eliminate the factual and legal barriers that hinder the full coverage of the internal market principle.

For any activities by MSs i.e. in the field of direct taxation its competences are limited to the extent that MSs may exercise their powers consistently with EU law, thus i.e. especially with the Freedoms of the Treaty.⁴⁷⁸ This seems to be true especially for the areas of interest as to REIT regimes in the EU that are the mutual recognition of companies and the avoidance of double taxation where the freedoms are fully exercisable.⁴⁷⁹ Therefore, in the absence of specific competences transferred by the MSs to the EU with the Treaty, it rests with the freedoms to serve as the benchmark for the compliance of MSs REIT regimes with EU law though.⁴⁸⁰

The basis of the European integration builds the common internal market. Hereto, the internal market was to serve for the European integration. Therefore, since the

MSs themselves and has to be organised by respective conventions in between the MSs prior to any competence for the EU coming into play. Such kind of a Ranking of competences in the area of international corporate law is sounded by the ECJ in Case C-81/87, “Regina v HM Treasury and Commissioners of Inland Revenue ex parte Daily Mail and general Trust plc.” (Case “Daily Mail”), (1988), ECR 5483, para 21 et seqq. The EU has attempted to deal with this point by seeking uniformity in the whole Community, or at least on the basis of “equivalents”, thereby, to set secondary law i.e. under the powers of Art 50 II though. As a result of this requirement, a Convention on the Mutual Recognition of Companies and Bodies Corporate was signed in 1968 by the six founder MSs of the EU that time the European Community, still. However, this Convention is not in force since the MSs did not ratify it though.

⁴⁷⁷ The internal market was numbered Art. 3 I lit. c and 14 II of the Treaty pre-Lisbon.

⁴⁷⁸ See i.e. Case “Schumacker”.

⁴⁷⁹ See Case “Überseering”, para 54 et seq.

⁴⁸⁰ For the assessment of the application of Article 18 in the context of the economic freedoms see Sec. 3.3 (1) below.

early days the EU⁴⁸¹ is based upon free trade between MSs.⁴⁸² But the Treaty express in Art. 3 the Community's emphasis on "...establishing an internal market..." still. However, where the Treaty post Lisbon seem to assume an internal market already being extant, even though not fully achieved,⁴⁸³ while listing the basis for the internal market only, Art. 2 and 3 pre-Lisbon listed the activities and measures to reach an internal market still. Hereto, the most obvious requirement was to remove trade barriers. The definition of the "common internal market" was given by the ECJ in Case "Gaston Schul" according to which decision the common internal market relies upon the abolishment of hindrances to intra community trade with the aim to merge national markets into a unified market that shares those conditions of a full internal market to the best extent possible.⁴⁸⁴ This principle of "functional integration"⁴⁸⁵ is outlined and described as being an "internal market" as:

*"...an area without internal frontiers in which free movement of goods, services and capital is ensured ...".*⁴⁸⁶

In the absence of uniform Community law in this area obstacles and distortions that could hinder the common market perspective of the Treaty freedoms that have direct effect MSs may have to consider that their domestic REIT regimes are incompatible with its prevailing Community law. There is a risk that there is friction between MSs tax provisions in REIT regimes where is actually no ground existing in order to justify different treatment of the foreign REIT compared with the domestic REIT. Thus, the principles of EU law that prohibit the discrimination of foreign nationals and residents are of issue.⁴⁸⁷

⁴⁸¹ That time the EU was known as the European Community the European Economic Community still.

⁴⁸² As it was stated in Art. 2 pre-Lisbon still.

⁴⁸³ Where the pre-Lisbon version of the Treaty was called "The Treaty Establishing the European Community", the post-Lisbon version is now called "The Treaty on the Functioning of the EU" (see OJ 2010/C83) and Art 26 I outlining the "... establishing or functioning ..." of the internal market.

⁴⁸⁴ See Case C-15/81, "Gaston Schul Douane Expéditeur BV v. Inspecteur der Invoerrechten en Accijnzen Roosendaal" (Case "Gaston Schul"), (1982), ECR 1409, para 33.

⁴⁸⁵ Schwarze (2007), p. 31.

⁴⁸⁶ See Art. 26 II.

⁴⁸⁷ See Art. 8. 10 and more importantly 18.

Any competence whether exclusive or subsidiary must be exercised in order to achieve the objectives of the Treaty in establishing the common internal market by harmonising the rules relevant in MSs on a EU level for which prohibition of discrimination and the fundamental freedoms of the Treaty a formative and setting out for the guiding framework to any competencies used for both the Commission on EU level and the MSs themselves.⁴⁸⁸ Accordingly, the ECJ has stated in 1983 already that the basis under which it considers potential harmful regulations are the fundamental freedoms⁴⁸⁹, which the ECJ in general understands under the meaning of the prohibition of discrimination. Thus, the Freedoms have nearly unlimited priority and national provisions must not be discriminatory.

Considering the issue at question as to whether REIT regimes provide for compliant framework to corporations and their respective cross-border activities within the EU potential fields for collision may be extant to the relevant conditions and activities. As for capital mobility, the Treaty focuses mainly on two types of freedom. The first is the right of any Community firm to set up in another MS that is the freedom of establishment.⁴⁹⁰ The second type concerns financial capital with the free movement of capital.⁴⁹¹ With a view to cross-border activities by REITs and its shareholders focus will be given to the content of these two capital markets freedoms and its impact on MSs REIT regimes. The Freedom of movement of services will be shortly discussed as well but not analysed in detail since it serves as a “catchall” provision and is, as it will be outlined in more detail below⁴⁹², be subordinate to the two main capital markets freedoms.

3.1 Freedom of Establishment

The main provisions of the Treaty concerned with the right of establishment and the freedom to provide services apply to companies. Hereto, the Treaty provides in its Art. 49 for the freedom of establishment by stating that the:

⁴⁸⁸ Schwarze (2007), p. 28.

⁴⁸⁹ See Case C-270/83, “Commissison v France” (Case “Avoir fiscal”), (1986), ECR 273, para 24.

⁴⁹⁰ See Article 49 et seqq. These “rights of establishment” are essential to integration in sectors with high “natural” trade barriers, e.g. in sectors such as insurance and banking, here physical presence in the local market is critical to doing business.

⁴⁹¹ Article 63 et seqq.

⁴⁹² See Sec. 3.3 below.

“...restriction on the freedom of establishment of nationals of a MS in the territory of another MS shall be prohibited...”.

3.1.1 Scope and statute elements

The scope of the freedom in Art. 49 I do not concern self-employed Individuals⁴⁹³ only but this freedom is granted both to natural persons and to legal persons equally.⁴⁹⁴ Hereto, Art. 54 I extend the coverage of Art 49 by stating expressively:

“Companies ... shall ... be treated in the same way as natural persons who are nationals of MS.”

Companies in the meaning of Art 49, 54 II are

“companies or firms constituted under civil or commercial law, including ... other legal persons governed by ... private law ...”.

The concept in Art. 54 may be irritating since para 1 uses the term “company” whereas para 2 calls the same subject “legal person”. However, in so far EU law does follow a separate definition for “legal person” that is different from national laws of the MSs. Thus, any type of a company may to be subsumed a “company” under Art. 54 provided for the existence of an adequate separation with the ability to take part and act under its own name in legal relations.⁴⁹⁵

3.1.2 Types of establishment

The Treaty identifies two rights for companies, namely, establishment and provision of services, what is called “primary establishment” (Art. 49 II) and the right to establish themselves in another MS by setting up agencies, branches or

⁴⁹³ See Case C-221/89, “R. v. Secretary of State for Transport, ex parte Factorame” (Case “Factorame II”), (1991), ECR I-3905, para 20; Case C-55/94, “Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano” (Case “Gebhardt”), (1995), ECR I-4165, para 25 (“...the concept of establishment within the meaning of the Treaty is, therefore, a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a MS other than his State of origin and to profit therefrom, so contributing to social and economic penetration within the Community in the sphere of activities as self-employed persons...”.).

⁴⁹⁴ See confirmation with Case “Gebhard”, para 23.

⁴⁹⁵ See Randelzhofer/Forsthoff (1999), Art. 48, recital 7. This includes, therefore, the condition for any company to follow a pecuniary reward and, thus, excludes non-profit firms or organisations, Art. 54 II.

subsidiaries, the so-called “secondary establishment” (Art. 49 I).⁴⁹⁶ As to REITs there are consequently two situations for a REIT to operate cross-border to fall under the freedom of establishment. First, a REIT having established itself and its registered seat in one MS is moving its central place of management in another MS, which is a case for “primary establishment” (=investment scenario V.) and secondly the REIT that keeps its registered seat and place of management in one MS but, additionally, establishes a subsidiary in another MS; what is called “secondary establishment” (=investment scenario II.).

The obvious observation to be made is that for both types primary and secondary establishment the criteria to be resident in a MS in order to proof not to be a non-EU corporation the REIT fulfils the criteria to be resident in one MS. According to the majority in Literature, the criteria of residence of companies equals the understanding for individuals that only those companies that are resident outside the EU are excluded.⁴⁹⁷ Therefore, a REIT corporation making use of either type of establishment comply with the statute elements of Art. 48 in conjunction with Art. 49 I 2. As a result, the REIT moving its business into another MS either by way of primary or secondary establishment falls under the spatial and personal scope of the freedom of establishment subject to meeting further conditions in order to validly rely on the freedom of establishment in cases of discriminatory treatment while operating in another MS i.e. conditions relevant for the local vehicle used to qualify for a “subsidiary” though.

3.1.3 Direct cross-border activity without setting up of a subsidiary

There is, however, a third case for REIT activities, however, to consider in a cross-border context. The situation is the one of a REIT that is having its registered seat and place of management in one MS where the REIT conducts its main business activities as well. But in addition to the activities in its MS of incorporation the REIT invests direct in real property in one or multiple other MSs, as part of its

⁴⁹⁶ There has been a discussion in Literature on the determination of the place of central management and activities of a subsidiary only by linking this question to the place where the main activities are exercised by the company but was diminished after the ECJ decided in “Centros” that the economic focus was not distinctive rather that the intention of the founder(s) of the company primarily decide. Therefore, this discussion does not need to be repeated anymore (see Case “Centros”).

⁴⁹⁷ See Randelzhofer/Forsthoff (1999), Art. 43, recital 46 et seqq.

operational business (=investment scenario I.). In this scenario the REIT does neither move its place of management outside the MS of its incorporation nor is the REIT using a local SPV structure in the other MS for its investment in real property. Rather, the REIT is investing direct cross-border. Where, however, the investment is conducted directly, thus, no local SPV intermediary is used that might qualify for a subsidiary of the foreign Investor though, neither primary nor secondary establishment is concerned.

Consequently, the situation where a REIT neither moves its seat nor sets up a subsidiary in another MS but likes to undertake business in another MS occasionally only will not benefit from the freedom of establishment while investing in the other MS. Thus, the freedom of establishment does not comprise investment scenario I.⁴⁹⁸

3.1.4 “Establishment” by participation

Another case of direct investment activity cross-border is purely by way of capital participation in a local entity. Here, the REIT does neither move its place of management nor sets up a subsidiary rather the REIT is engaged indirect through shareholdings in local SPVs or through local vehicles.⁴⁹⁹ Following the findings from the direct cross-border case above ((1.3)) the freedom of establishment seems not concerned, neither through primary nor secondary establishment. Especially, since none of the activities themselves nor the local SPV of which the shares are held, however, may qualify as a subsidiary of the (foreign) REIT (=investment scenario III. and IV.).

To answer the question for qualifying criteria for a local subsidiary is subject to its country of its establishment. However, to answer the question of connecting criteria for a subsidiary, thus, whether in these scenarios the freedom of establishment is concerned the freedom may be defined in general. Hereto, reference is made to the description of the freedom in Art 49 II since EU law does not provide for any definition on this though. According to Art. 49 II the freedom of establishment comprises the commencement and exercise of business

⁴⁹⁸ See Chapter II, Sec. 5.4.1 above (Figure II.5.4-1).

⁴⁹⁹ The investment in a local vehicle might include capital participations in a local REIT as well.

independently as well as the establishment and administration of a company. Therefore, the extent of protection is not limited to the incorporation and operation of a subsidiary but include the prohibition of any restrictions to it too.⁵⁰⁰ Therefore, a subsidiary is a fixed organisation of the company in the other MS that is deemed to be included into the economic environment of that other MS in order to exercise an independent business.⁵⁰¹ However, the statute element of a effective and intended exercise⁵⁰² of a business shall assist to carve out those undertakings which do not fall within the scope of the freedom of establishment. Therefore, for any assumption of a business with reference to Art. 3 an activity within economic life is necessary and its exercise may be viewed as effective where the activities from the subsidiary are not marginal only. Furthermore, beside its integration into the political economy⁵⁰³ a distinction of the freedom of establishment towards the freedom of services is possible since the one referring to the freedom of establishment will not integrate into the political economy as such.

Therefore, the shareholding in a local SPV may not exceed what is, however, necessary to exercise business independently nor to administer the (target) by the shareholder itself. However, contrary to the direct cross-border case, the investment in shares by a foreign REIT in a REIT in another MS while neither setting up a subsidiary nor moving its place of management in that other MS (=investment scenarios III. and IV.) qualify for the benefits of the freedom of establishment though⁵⁰⁴ Hereto, Art. 55⁵⁰⁵ ensures the freedom of establishment through participation in companies⁵⁰⁶ and the right to pursue economic activities, through a company, under the conditions laid down by the legislation of the other MS for its own resident.⁵⁰⁷

⁵⁰⁰ See Randelzhofer/Forsthoff (1999), Art. 43, recital 63.

⁵⁰¹ Ibid, recital 13.

⁵⁰² Ibid, recital 14 et seq.

⁵⁰³ Ibid, recital 22 et seq.; Rhem (2004), p. 32 et seq.

⁵⁰⁴ However, activities in case of investment scenarios I. and IV as well as II. and III. (see Chapter III, Sec. 3.4.1), where shareholdings are concerned the foreign REIT may be able to validly rely on the freedom of service and/or the freedom of capital that, therefore, will be discussed in the following Section.

⁵⁰⁵ Formerly Article 294 pre-Lisbon.

⁵⁰⁶ As well as the free movement of capital (see Case "Daily Mail", p. 5511).

⁵⁰⁷ See Case C-246/89R, "Commission v. United Kingdom", (1989), ECR I-3125, p. 3133.

3.1.5 Test for company

As concerns natural persons, the question arises whether the person is a national of a MS. This question will for them be decided on the basis of the law of the MS that confer to nationality and other MS have to abide by that decision.⁵⁰⁸ Thus, in order to benefit from the provisions on freedom of establishment, a company must be

*“... formed in accordance with the law of a MS ...”*⁵⁰⁹

and fulfil alternatively one of the three possible connection criteria with the Community as Art. 54 I states to

“... having their registered office, central administration or principal place of business within the Community ...”.

As such, Art. 54, para 1 calls for the “test of company” to be complied with by asking the company for having its (i) registered office, (ii) central administration or (iii) principal place of business within the Community. However, one of the main problems encountered is that whereas self-employed natural persons⁵¹⁰ are uniform in their identity across the Community, this does not apply to companies. As indicated, companies should be able to conduct business on the basis of non-discrimination on grounds of nationality but it has to be considered that MSs have different requirements with regard to such matters as incorporation, registration and liability. The fact that there are three alternative connection criteria, placed on equal footing, reflects that there is a disparity in what MSs consider to be the relevant connection criteria between company and the national territory.⁵¹¹

⁵⁰⁸ See Case C-369/90, “Micheletti v. Delegación del Gobierno en Cantabria”, (1992), ECR I-4239.

⁵⁰⁹ See Art. 49 I, 54 I.

⁵¹⁰ According to Art. 49 self-employed have the right to establish themselves in another MS. Being “self-employed” was been defined by the ECJ in Case “Jany” as a person that “unlike workers ... work outside a relationship of subordination, they bear the risk for the success of their employment or failure of their employment, and they are paid directly in full” (see Case C-268/99, “Aldona Malgorzlata Jany and Others v. Staatssecretaris van Justitie”, (2001), ECR I-8615, para 34 and 70-71).

⁵¹¹ See Dyrberg (2003), pp. 528/529.

Therefore, beside the test for company and the fulfilment with its connection criteria, the “test of recognition” has to be made in order to determine whether a company may claim the freedom of establishment in the EU. MSs use different rules within their private laws to determine whether recognition is to be given to companies that are notionally formed under the legislation of a foreign state still.⁵¹² Here, the question of the conflict of laws will then come into play according to the situation specific at issue. These conflicts have been subject to decisions by the ECJ since long. Hereto, the ECJ has recently decided that what is nationality for natural persons is the real seat for companies⁵¹³ and further details to this discussion, however, are subject to further evaluation in the following chapter.⁵¹⁴

3.1.6 Implied warranty and prohibition of discrimination or restriction

Having so established themselves, the companies have the right not to be discriminated against and must be treated under the same conditions as those laid down by the MS for its own nationals. Therefore, where a company establishes itself with its activities in another MS, either by way of primary or secondary establishment, and being hindered with its establishment or the exercise of its business the statute elements of the freedom of establishment are fulfilled. As a legal consequence Art. 49 I 1 provide for the prohibition of such discrimination or restriction.

Within the context of the following Articles 50 et seqq., however, it has to be noted that according to the wording of Art. 49 II the exercise of the freedom of establishment is linked to the provisions of law of the other MS. This means that the freedom of establishment is actually a specific form of the principle for equal treatment of residents.⁵¹⁵ Furthermore, the principle of equal treatment does include all types discriminatory or restrictive acts whether openly or hidden simply on the basis of nationality.⁵¹⁶ This type of discrimination on the basis of nationality

⁵¹² Hereto, discussion of national laws and its conflicts are discussed in more detail in Section 5 below linked to the application of the international company law.

⁵¹³ See Case “Centros”, para 20, Omar (2002), p. 449.

⁵¹⁴ See Chapter IV below.

⁵¹⁵ See Schwarze (2007), p. 69.

⁵¹⁶ See Case C-2/74, “Jean Reyners v Belgian State”, (1974), ECR I-00631, para 24.

is called “direct” discrimination whereby those acts that are focused towards non-residents only are so-called “indirect” discriminatory acts.⁵¹⁷

In addition to the prohibition of any discriminatory provisions Art. 49 serve for the probation of any restrictive acts as well.⁵¹⁸ Where a company through an act of national law that are imposed in a “non-discriminatory” way is confronted with indirect discrimination and, though, being hindering or making it less attractive to make use of its fundamental freedom is lawfully entitled to call upon for the freedom of establishment. Consequently, based on this so-called “Gebhard-Formula”⁵¹⁹, any company may not be restricted in its freedom by the application of another MS’ national provision.⁵²⁰ In case, however, any restriction of the freedom of establishment is justified only where such restriction is applied in a non-discriminatory way and the measure is justified for reasons of the basic interests of the society and being proportionate in nature.⁵²¹

3.1.7 Summary

The objective of the freedom of establishment is the abolishment of hindrances to intra-community trade aiming for a unified market with shared conditions. Thus, freedom while having no frontiers as the ECJ clarified with its decision in Case “Gaston Schul”. Any measures by MSs that restrict the establishment in another MS are, therefore, subject to the freedom of establishment under Art. 49 and 48, which include any company fulfilling the statutes element that is being established in and under the laws of one MS and acting for pecuniary rewards. In this meaning REIT corporations can be classified as legal persons within the meaning of Art. 48. Provided that a company has been established according to the law of a MS and, thus, incorporated according to MS’ law and having its statutory seat in one MS fulfils the conditions outlined for the “test of company” validly falls under the

⁵¹⁷ See Geiger (2004), Art. 49, recital 12 et seqq.

⁵¹⁸ See Cases C-340/89, “Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg”, (1991), ECR I-2357, para 15; C-19/92, “Kraus”, (1993), ECR I-01663, para 32; and Case “Gebhard”, para 37 et seqq.

⁵¹⁹ See Schwarze (2007), p. 70.

⁵²⁰ See Case “Gebhard”, para 37; Schwarze (2007), p. 69/70.

⁵²¹ See Case “Gebhard”, para 37, where the ECJ in its decision transferred the principles developed for the freedom of movement of goods in the Case “Cassis de Dijon” to the freedom of movement of persons.

scope of the freedom of establishment either with its primary or secondary establishment.⁵²²

Hence, a REIT under investment scenario V. moving its business by way of moving its “place of management” in another MS (=primary establishment) or under investment scenario II. establishing a subsidiary in another MS (=secondary establishment) fall under the scope of Art. 49. Provided in cases of secondary establishment, however, the local SPV meets the conditions set for “subsidiaries” though.⁵²³ Furthermore, any activities by shareholders either by participating in domestic companies⁵²⁴ (=investment scenario IV.) or shareholdings in a domestic REIT (investment scenario III.) and the right to pursue economic activities, through a local company, under the conditions laid down by the legislation of the other MS for its own resident⁵²⁵ must be treated equally as nationals of the other MS themselves according to Art. 55⁵²⁶, thus, such activities by the foreign REIT fall under the freedom of establishment though.

Where, however, a REIT having its registered seat and central place of management in one MS and conducts its operational business partly or exclusively by i.e. investing direct into real properties in another MS while keeping its place of management, thus, without the setting up of an agency, branch or subsidiary in the MS of its activities the REIT cannot rely on the freedom of establishment in the MS of its operational activities (= investment scenario I.).⁵²⁷

In applicable cases the REIT operating its business in another MS benefit from the principle for equal treatment of residents. Thus, any discriminatory measures on grounds of nationality (=direct discrimination) and those towards non-residents

⁵²² See Case “Cassis de Dijon”. Hereto, the “test of recognition” must not lead to a different result. Otherwise, the result may be discriminatory again and, thus, again a violation of the freedom of establishment as outlined by the ECJ already (see Cases “Centros” and “Überseering”). Further discussion on this case law will be given in more detail Chapter IV below.

⁵²³ The qualification of the local SPV depends on the (other) MS’ corporate law and i.e. its acknowledgement of a transparent partnership structure as “subsidiary” in terms of secondary establishment as well as local requirements set for companies to qualify for “subsidiary” though.

⁵²⁴ As well as the free movement of capital (see Case “Daily Mail”, p. 5511).

⁵²⁵ See Case C-246/89R, “Commission v. United Kingdom”, (1989), ECR I-3125, p. 3133.

⁵²⁶ Formerly Article 294 pre-Lisbon.

⁵²⁷ Any cross-border activity of this type by a REIT i.e. the acquisition of real property in another MS may be subject to the freedom of movement of services and/or the freedom of capital though (see Case C-302/97, “Klaus Konle v. Republic Österreich” (Case “Kohnle”), (1999), ECR I-3099).

only (=indirect discrimination) violating the freedom of establishment under Art. 49. According to the “Gebhard-Formula” indirect discrimination, however, include measures that are not precluding rather hindering only or just making activities by a non-resident less attractive as well. Those restrictions, however, may be justified, though. According to Case “Gebhard” the ECJ has limited possible cases for justification. The ECJ stated with reference to Case “Cassis de Dijon”⁵²⁸ that measures might be justified only provided they are applied in a non-discriminatory way (neither direct nor indirect) and evidence for justification is given on the basic interest of society and the measure taken being proportionate.

Thus, the suspect provisions identified in MSs REIT regimes especially those relating to conditions to the legal requirements as well as the relevant tax treatment fall under the freedoms scope. The suspected cases outlined in MSs REIT regimes violate the freedom of establishment while discriminating on grounds of nationality purely. This is seen with the legal requirements with respect to legal form, residence, listing and shareholder requirements may apply to all REITs either domestic or non-domestic but with respect to non-resident (REIT) corporations it constitute an indirect discrimination that hinder its establishment in another country since they are already legally established in another MS. This holds true for imposing withholding tax on the distributions to non-resident shareholders of the domestic REIT equally. Furthermore, this expressively breaches the prohibition made in Art. 55 as well.

Table III.3.1-1: Investment scenarios in scope of the freedom of establishment - summary

Investment Scenario	Scope of freedom of establishment		Source
I	no	n/A	
II	yes		Article 49 II (“primary establishment”)
III	yes		Article 55
IV	yes		Article 56
V	yes		Article 49 I (“secondary establishment”)

Source: Original by W. Speckhahn

In addition to the violation of the freedom of establishment it is to consider whether suspect provisions violate the freedom of movement of capital too. Hence,

⁵²⁸ See Case “Gebhard”, para 37.

question arises whether there is a ranking in between the freedoms whereby one precedes the other. Hereto, the ECJ outlined that the freedom to move capital is a precondition for the effective exercise of the freedom of establishment.⁵²⁹ The ECJ, however, provided a tendency to favouring deciding the cases under the capital provisions rather the establishment rules.⁵³⁰ The consequence laying with this differentiation and favouring of the freedom of establishment is that the freedoms other than for capital do not provide for such an extensive list of express derogations. Thus, the existence of potential justifications shall be subject for further evaluation in the context of the ECJ decisions below.⁵³¹

3.2 Freedom of Movement of capital

With the freedom of movement of capital the Treaty goes “deep”.⁵³² Hereto, it states in Art. 63 I that all restrictions on capital flows (e.g. cross-border investments in stocks and bonds, and direct investment in productive assets by multinationals) shall be abolished. It applies the same to current payments related capital flows (e.g. the payment of interest and repatriation of profits). Very little capital-market liberalisation, however, was undertaken⁵³³ until the 1980s since the Treaty provided an important loophole. It allowed capital market restrictions when capital movements create disturbances in the functioning of a MSs capital market.⁵³⁴ Moreover, it did not set a timetable for this liberalisation since there was no specific timeframe set for the so-called “transitional period”.⁵³⁵ However, direct investments in another MS have been addressed already before. Under the original Art. 67 of the EEC Treaty the Council enacted Directives during the first stage of the “transitional period” on i.e. capital movements already. In order to specify the “freedom” and the broad terms in which the Treaty drafted the freedom on capital movement the Directives have set out lists to categorise different degrees of liberalisation.⁵³⁶ Here, direct investments in real estate were to be

⁵²⁹ See Case C-203/80, “Criminal Proceedings against Guerrino Casati” (Case “Casati”), (1981), ECR-2595, para 8.

⁵³⁰ See Barnard (2004), p. 481.

⁵³¹ See Barnard (2004), p. 482.

⁵³² See Baldwin/Wyplosz (2009), p. 54.

⁵³³ See Barnard (2004), p. 461.

⁵³⁴ See Case “Casati”, para 9.

⁵³⁵ See Usher (1992).

⁵³⁶ See Council Directives JO 921/60 and JO 62/63 as well as finally Directive 88/361 (OJ 1988, L178/5), which finally established the basic principle of free movement of capital and explicitly mentioned in its headings of the nomenclature i.e. investments in real estate.

found in “List A” which contained areas of full liberalization without any authorization requirements already.⁵³⁷ But true capital market liberalisation became a reality over 30 years later only with the Single European Act and the Maastricht Treaty.⁵³⁸ Thus the freedom of movement of capital is essential part of the internal market in the meaning of Art. 3 and its elements of an “...open market economy with free competition...” as provided by Art. 120.⁵³⁹ It took, however, until the Treaty of Maastricht, which “upgraded” the freedom of movement of capital from an ancillary freedom to a substantial and direct applicable Freedom⁵⁴⁰ and, thus, was the only freedom to be substantially amended.⁵⁴¹

3.2.1 Scope and statute elements

The freedom of movement of capital is the fourth freedom.⁵⁴² The Treaty provide or this freedom in its Art. 63 I by stating that:

“... all restrictions on the movement of capital between Member States ... shall be prohibited ...”.

Hereto, the Treaty in its Art. 64 make explicit reference to and explicitly include investment in real estate under the scope of the freedom of movement of capital as it was prior confirmed by the ECJ i.e. in Case “Kohnle” already.⁵⁴³ In this context importance was given already to applicable provisions of MSs tax laws that must not distinguish between resident and non-resident taxpayers.⁵⁴⁴

3.2.2 The definition of “capital”

Capital movements are not defined by the Treaty but include in essence direct investments in another MS.⁵⁴⁵ “Capital transfers” in this context comprise of the investment related transfer of assets by way of real or monetary capital from one

⁵³⁷ See Usher (2000), p. 17.

⁵³⁸ See Baldwin/Wyplosz (2009), p. 54.

⁵³⁹ See Barnard (2004), p. 461; Schwarze (2007), p. 92.

⁵⁴⁰ See Schwarze (2007), p. 94; Joint Cases C-163/94, C-165/94 and C-250/94, “Criminal Proceedings against Sanz de Lera and Others” (Joint Cases “Sanz”), (1995), ECR I-4830, para 41; Joint Cases C-358/93 and C-416/93, “Criminal Proceedings against Aldo Bordessa and Others”, (1995), ECR I-361, para 33.

⁵⁴¹ See Usher (2000), p. 1.

⁵⁴² See Case C-463/00, “Commission v Spain” (Case “Spain 2003”), (2003), ECR I-4581, para 68.

⁵⁴³ See Case “Kohnle”.

⁵⁴⁴ See Art. 65 I lit. a) and b).

⁵⁴⁵ See Joint Cases “Sanz”, para 33.

MS into another MS.⁵⁴⁶ Examples for such capital transfers are beside other i.e. investments in real property⁵⁴⁷ as well as investment in a company by means of shareholding.⁵⁴⁸ Therefore, transferring capital cross-border either for the purpose of the direct acquisition of real estate to pay off the purchase price⁵⁴⁹ (=investment scenario I.) or the subscription of a participation in the capital of a domestic company⁵⁵⁰ (=investment scenario II – IV.) falls under the scope of the freedom of movement of capital.

3.2.3 Restrictions and Discriminations

Since the Maastricht Treaty, Art. 65 refer to “restrictions” towards other MS and its residents in general whereas the ECJ is referring to “discriminations” as well in order to consider MSs regulations of being prohibitive as this was the concept of Art. 63 in its pre-Maastricht wording having been Art. 67 at that time.⁵⁵¹ Measures that constitute restrictions are to be interpreted widely since in the aftermath of the changes following the Treaty of Maastricht there are no expressed restrictions mentioned in Art. 63 anymore. Rather, it is outlined that any measure that restrict the free movement of capital is at issue and viewed to be prohibitive. Therefore, Art. 63 include measures that directly⁵⁵² and indirectly⁵⁵³ interferes cross-border capital movements. This includes especially measures by way of introducing regulations in i.e. domestic tax laws that restrict the freedom indirectly⁵⁵⁴ but, consequently, those measures that are considered to be non-discriminatory but substantially impede the free movement of capital as well.

As outlined by Barnard⁵⁵⁵ there are two different formula used to identify a breach of Art. 63, which are the “discrimination model” and the “model based on

⁵⁴⁶ See joint Cases C-286/82 and C-26/83, “Luisi and Carbone v Ministero del Tesoro” (Case “Luisi and Carbone”) (1984), ECR 377, para 21.

⁵⁴⁷ See Directive 88/361/EEC, Annex 1, point II of the nomenclature (Directive on capital movements, (1988), OJ L178/5)).

⁵⁴⁸ See Case C-367/98, “Commission v. Portugal” (Case “Golden Share”), (2002), ECR I-4731, para 38; Case C-35/98, “Staatssecretaris van Financiën v. Verkooijen” (Case “Verkooijen”), (2000), ECR I-4071, paras 28-29.

⁵⁴⁹ See Case “Kohnle”.

⁵⁵⁰ See Case “Verkooijen”, para 29.

⁵⁵¹ See Barnard (2004), p. 465.

⁵⁵² See i.e. Cases “Konle” and “Golden Share”, para 40.

⁵⁵³ See i.e. Case “Spain 2003”; C-98/01, “Commission v. UK”, (2003), ECR I-4641; Case C-384/93, “Alpine Investments”, (1995), ECR I-1141.

⁵⁵⁴ See Schwarze (2007), p. 95.

⁵⁵⁵ See Barnard (2004), p. 466-472.

restrictions". According to the so-called "restriction based model" measures are differentiated in between direct discriminatory and just being liable to prevent or (substantially) impede free movement of capital. Here, any measure may not be in breach of Art. 63 unless justified by overriding requirements of general interest or express derogations in Art. 65 and where proportional. Otherwise, any measure which is in breach in general but the breach is not substantial or is too remote from affecting inter-state capital movements would be not in breach of Art. 63.⁵⁵⁶ Different, the ECJ applies with its so-called "discrimination-model" grounds on which discrimination is prohibited that are coming out of the express listings in the Annex of Art. 67 pre-Maastricht, which are especially: nationality, residence and place of investment. The main difference is that the discrimination model differentiate measures as to whether they are direct, indirect or non-discriminatory versus the restriction model under which differentiation is made between measures that are direct discriminatory or liable to prevent or (substantially) impede free movement of capital. There is, however, no clear differentiation in between the models since the ECJ is not consistent in its terminology⁵⁵⁷ and include any measure that can be called an "obstacle"⁵⁵⁸, that is "liable to dissuade"⁵⁵⁹ or "likely to deter"⁵⁶⁰ as those of creating a prohibition of the free movement of capital though.

3.2.4 Justification

Whichever formula is used, where the Court finds a measure, in principle, in breach of Art. 63 there may be justification of a direct discriminatory measure by express derogations under Art. 65 provided they are proportional and legally certain and other, indirect or non-discriminatory measures may be justified and steps taken are proportionate.⁵⁶¹

⁵⁵⁶ See Barnard (2004), p. 471.

⁵⁵⁷ See Barnard (2004), p. 471.

⁵⁵⁸ See Case C-439/97, "Sandoz GmbH v. Finanzlandesdirektion für Wien, Niederösterreich und Burgenland", (1999), ECR I-7041, para 20.

⁵⁵⁹ See Case C-222/97, "Manfred Trummer and Peter Mayer", (1999), ECR I-1661, para 26 and the "dissuasion test" used in Case "Verkoijen", para 34-36.

⁵⁶⁰ See Cases C-478/98, "Commission v. Belgium", (2000). ECR I-7587, para 18; Case C-484/93, "Svensson and Gustavsson v Ministre du logement et de l'urbanisme" (Case "Svensson and Gustavsson"), (1995), ECR I-3955, para 5; Case "UK 2003", para 61.

⁵⁶¹ See Barnard (2004), p. 472.

Qualified measures to restrict the free movement of capital are limited to the situations explicitly listed in Art. 64 – 66. While Art. 64 and 66 focus on restrictions towards third countries outside the EU and, thus, being outside of scope of this analysis, Art. 65 comprise express derogations in relation towards other MS. Hereto, Art. 65 I provide a general⁵⁶² and a specific derogation. The general derogation include measures to prevent infringements of national laws especially in the fields of taxation and financial supervision or measures which are justified on grounds of public policy or security (Art. 65 I lit. b)), where the specific derogation include different treatment of taxpayers on the ground of their residence (Art. 65 I lit a)). These derogations seem to provide MSs with the “authorisation to discriminate in the tax system between resident and non-residents” as Usher⁵⁶³ outlines. However, these provisions have to be set into and seen in the context of the Treaty provisions according to which the freedoms cannot be overridden. Thus, the express derogations have to be interpreted restrictive⁵⁶⁴ and must not be misapplied i.e. to serve for purely economic purposes⁵⁶⁵ and do not provide a “carte blanche” for discrimination on grounds of nationality⁵⁶⁶ or make it acceptable as State Aid.⁵⁶⁷ Further, any measure/rule must be proportionate⁵⁶⁸, subject to the principle of legal certainty⁵⁶⁹, and not be attained by less restrictive measure.⁵⁷⁰

3.2.5 Summary

According to Art. 63 et seqq. the freedom of movement of capital include, beside other discriminations, the abolishment of restrictions as to i.e. investments in real estate (Art. 64). Thus, REITs resident in the EU may rely on this freedom when

⁵⁶² The general derogation in Art. 65 I (b) replicate Art. 4 of the Directive 88/361.

⁵⁶³ See Usher (2000), p. 32 and 39.

⁵⁶⁴ See Case C-54/99, “Association Eglise de Scientologie de Paris v. Premier Ministre” (Case “Scientologie”), (2000), ECR I-1335, paras 17-18.

⁵⁶⁵ See Case “Rutili”, para 30 and Case C-367/98, “Commission v. Portugal”, (2002), ECR I-4731, para 52.

⁵⁶⁶ See Usher (2000), p. 33.

⁵⁶⁷ Ibid, p. 40.

⁵⁶⁸ see Schwarze (2007), p. 98.

⁵⁶⁹ The “principle of legal certainty”, even though a general principle of law, was stated clearly as a requirement by the ECJ in Case C-222/86, “Union nationale des entraineurs et cadres techniques professionnelles du football (Unectef) v. Georges Heylens and Others”, (1987), ECR 4097, para 22. See also in case of foreign direct investments Case “Eglise de Scientologie”, paras 19-22 and Case C-423/98, “Alfredo Albore” (Case “Albore”), (2000), ECR I-5965, para 21 where that was found missing in cases of MSs requesting prior authorisation for an activity by non-residents.

⁵⁷⁰ See Case “Eglise de Scientologie”, para 18.

actively being engaged in real estate investments cross-border in another MS through direct investments in real property without setting up a subsidiary (=Investment scenario I.) or through a capital participation as shareholder in a domestic entity (=Investment scenarios II. – IV.) either in full or with a participation only.⁵⁷¹ Additionally, moving the place of management cross-border into another MS (=investment scenario V.) fall under the freedom of movement of capital as well.

Table III.3.2-2: Investment scenarios in scope of the freedom of movement of capital

Investment Scenario	Scope of freedom of movement of capital	Source	Derogation
I - V	yes	Article 63	Article 65 I (“tax law”)

Source: Original by W. Speckhahn

Though, financial interests are laid down by MS, i.e. in tax provisions, Art. 65 reflect the acknowledgement of existing tax laws in MS⁵⁷² and provide for specific tax derogation. These provisions are the focus of the specific derogation in Art. 65 I lit. a), allowing MS in their tax laws to distinguish between resident and non-resident taxpayers or the place where their capital is invested⁵⁷³ provided that the situations are not objectively comparable.⁵⁷⁴ Furthermore, measures in the field of taxation may not be considered a breach of Art. 63 that can be subsumed under the general derogation in Art. 65 I lit. b). Herewith, the Treaty provides MS with a mean to combat illegal activities such as tax evasion.⁵⁷⁵ Provided, however, that the fiscal measure does not consists in “... an outright prohibition on the exercise of a fundamental freedom ...” which is guaranteed under Art. 63.⁵⁷⁶

⁵⁷¹ The case, however, where the foreign REIT is moving its entire business (place of management) or where the foreign REIT is setting up a subsidiary cross-border into another MS the freedom of establishment is engaged (see Section (1) above).

⁵⁷² See Declaration on Art 73d (now Article 65) of the Treaty of the European Community.

⁵⁷³ See Case “Verkooijen”, para 38.

⁵⁷⁴ Here, the Treaty effectively codified the ECJs case law of Case “Schumacker”, para 32 and Case C-204/90, “Bachmann v. Belgium” (Case “Bachmann”), (1992), ECR I-249.

⁵⁷⁵ See Case C-478/98, “Commission v. Belgium” (Case “Eurobond”), (2000), ECR I-7587, para 38.

⁵⁷⁶ See Case “Eurobond”, para 45.

It seems that the Treaty with the express derogations set the framework for measures by MS to legally restrict the free movement of capital provided, however, the measure does not constitute a means of arbitrary discrimination according to Art. 65 III though. Therefore, where a rule applies equally to residents and non-residents the measure underlying may be justified still. This seems to hold true for the legal requirements (legal form, residence and listing) by MS REIT regimes that apply equally to all REITs and do not distinct as to nationality. Whereas, suspect provisions identified such as MS regime limitations to shareholder and domestic assets quota are direct restrictive measures neither justified on grounds of express derogations nor can they considered to be non-discriminatory though.

Same applies for the case where MS require a foreign REIT to moving itself or setting up an entity that qualifies for REIT regime in that MS in order to qualify for the domestic REIT regime (=original qualification) or being eligible to opting or the domestic REIT regime (=derivative qualification) before benefiting from the domestic REIT regime. By not providing for an EU wide accepted REIT regime and the conditions under MS REIT regimes differ especially the derivative qualification “option” seems disproportionate. The requirements for “opting” represent a “licensing” process for foreign REITs though. The discretion MS use within their REIT regime in setting the conditions for qualifying to opt for REIT status constitute “a serious interference with the movement of capital, and may have the effect of excluding all together”.⁵⁷⁷ Hereto, justification by express derogations does not apply since the underlying situation seem comparable, thus, derogation by Art. 65 I is not concerned.

Furthermore, derogations do not apply for the cases identified with the tax treatment. Where domestic tax regimes differentiate for REITs and its shareholder in between resident and non-resident REITs and shareholders as this is seen with most of the regimes levying withholding tax to non-resident REITs and shareholders only (indirect) arbitrary discrimination is engaged. Thus, the often used argument that domestic “requisite measures” are justified since they are to

⁵⁷⁷ See Case C-483/99, “Commission v France” (Case “Elf-Aquitane”), (2002), ECR I-4781, para 51.

secure for the cohesion of the (domestic) tax system is valid provided the measure applies equally only. However, it must be shown that effective measures are taken at the domestic level in the MS tax system to deal with the perceived problem, thus, being proportionate.⁵⁷⁸ The Treaty, however, is broad in its wording⁵⁷⁹ of the express derogations in Art. 65 I as well as in III, thus leaving room for interpretation though. Hence, on the pure basis of the Treaty' wording in Art. 65 and its derogations final assessment of a restrictive type of such a measure is not possible. It is, therefore, to analyse the content of the express derogations in more detail and to identify their reach and limits. Thus, the ranking order in between the freedom of establishment versus the freedom of movement of capital becomes more important especially with view to the express derogations eligible for MS that are not extant for any measures that are subject to assessment of the freedom of establishment.⁵⁸⁰

Therefore, further analysis of primary European law to seek for interpretation especially on the kind of justifications and the type of proportionality must be considered. Beside the express derogations there are unwritten reasons for justification on grounds of the general interests that are developed by the ECJ in its case law that builds part of primary European law though will be of further detailed discussion later in this chapter.⁵⁸¹

3.3 Freedom of Movement of Services

As seen in Chapter II a REIT invests in real property not for itself rather for its shareholders and in case where the REIT is a corporate but of fund type the REIT' management is serving and managing the special real estate fund. Where the REIT serves foreign shareholders or more specifically is actively investing in

⁵⁷⁸ See Case "Bachmann" and its criteria laid out for what is arbitrary discrimination being relevant still.

⁵⁷⁹ See Usher (2000), p. 57.

⁵⁸⁰ See Section 3.1.7 on the freedom of establishment above.

⁵⁸¹ See i.e. the ECJ carrying forward its possibilities for justification of the Case "Cassis de Dijon" in Case C-148/91, "Veronica v. Commissariaat voor de Media", (1993), ECR I-487. Further justifications have been accepted by the ECJ in the field of taxation under Art 65 in Cases "Konle", later Case C-213/04, "Burtscher v. Stauderer", (2005), ECR I-10309; Case C-9/02, "de Lasteyrie du Saillant v. Ministère de l'Economie, des Finances et de l'Industrie" (Case "Lasteyrie"), (2004), ECR I-2409 and Case C-446/03, "Marks & Spencer v. David Halsley" (Case "Marks & Spencer"), (2005), ECR I-10837.

another MS and thus serving shareholders in that MS as well the freedom of movement of services may be concerned.

3.3.1 Catchall clause

The freedom of movement of services according to Art. 56 set out provisions to prohibit MS from introducing "... restrictions on freedom to provide services in respect of nationals of MS ..." established in the EU. "Services" in the meaning of Art. 57 I are activities that are provided for remuneration i.e. activities of a commercial character (Art. 57 I lit. b)). Restrictions to be prohibited are with regards to the entry into and residence in the territory of the MS and as regards the application of the prohibition of all discrimination on the grounds of nationality.⁵⁸²

3.3.2 Ancillary services by REITs

However, the freedom of services is designed to serve as a catchall element. The concept of the freedom of service, therefore, will come into play in situations where the freedom of movement for goods, capital and persons cannot be called upon as expressively outlined in Art. 57 I. Thus, where the services of REITs are covered under another type of the freedom of movement there is no room for the application of the freedom for services.

Where, however, the foreign REIT provide service to the management of the assets in the other MS the question arise whether this activity may be covered by the freedom of movement for services or already covered with the freedom of movement of capital. To make the distinction in between the freedoms is not an easy undertaking. The payment of remuneration in return for services was determined by the ECJ to be an activity falling under the freedom of movement for Service in contrast to the investment into real property that is subject to the freedom of movement of capital as already outlined.⁵⁸³ In another decision the ECJ ruled that the investment in real property falls under the scope of the freedom of establishment as well as the freedom of movement of capital.⁵⁸⁴ Thus, no clear picture and delimitation of scope is possible since the application of freedoms in

⁵⁸² See Case C-107/94, "Asscher v. Staatssecretaris van Financien", (1996), ECR I-3089., para 39

⁵⁸³ See Case "Luisi and Carbone", para 21.

⁵⁸⁴ See Case "Konle", para 22.

parallel is eligible.⁵⁸⁵ However, what becomes clear is that anyway which freedom is in scope the ECJ applies first and before all one of the main freedoms such as to the establishment and capital for situations in which investment in real property is concerned. Thus, the freedom of movement of services is residual.⁵⁸⁶ Therefore, the freedom of movement for services may come into play as it is designed for where no other freedom can be evoked and Art. 56 is subordinate to and may be applied in order to safeguard the Treaty's objectives for a certain cross-border situation only.⁵⁸⁷ As long as the "Service", however, is not the main activity rather being itself part of the activity such as i.e. an ancillary service that comes with the application of the freedom is assessed on grounds of the main activity. With investments in real property by a REIT the investment as such is the main activity at issue but not the management of the property itself that is, hereto, of ancillary nature only. Additionally, the management service by the REIT for its cross-border investment is usually not a service that is offered on the foreign market as such and as a separate business that the primary focus of the activity is the capital transfers rather the service offering.

Taking the above conclusion is to make that the ancillary services of a REIT for its cross-border investments into real property may be covered by the freedom of movement for services only where no other freedom can be called. Since this seems the case with the freedom of establishment and of movement of capital the freedom of movement for service stays subordinate.⁵⁸⁸ Thus, no closer analysis of the statute elements of the freedom of movement for services must be undertaken.

⁵⁸⁵ See ECJ in Case "Svensson and Gustavsson", para 7 et seqq.; Case C-222/95, "Parodi v Banque H. Albert de Bary et Cie.", (1997), ECR I-3899; Case C-410/96, "Criminal Proceedings against Ambry", (1998), ECR I-7875; Case "Portugal 2002".

⁵⁸⁶ See i.e. Case C-1/93, "Halliburton Services BV v Staatssecretaris van Financien" (Case "Halliburton"), (1994), ECR I-1137. Different case, however, was provided with Case C-296/12, "Commissison v Belgium", (2014), not yet published, 23.01.2014, para 51; "... since the freedom of service preclude the rule at issue ... there is no need to examine them separately in light of Art. 63, freedom of movement of capital ..." (see C-383/10, "Commission v Belgium", para 74).

⁵⁸⁷ See Barnard (2004), p. 330; Case "Gebhard", para 22.

⁵⁸⁸ See Barnard (2004), p. 481 (with reference to i.e. Case "Halliburton").

3.4 Other Treaty connecting factors – Fiscal State Aid

Beside the fundamental freedoms the Treaty provide with its State Aid provisions for additional rules, which governments have to take into consideration while establishing regimes and treatments that focus on domestic business activities. Where the view in the above analysis has been more of a view to cross-border situations there are limitations set for MS to internally promote its economies. Such types of selective aid tax measures may be viewed as “state aid” and, thus, may fall under the so-called State Aid rules contained in Art 107 I, which qualifies state aid incompatible with the internal market while likely to distort or threatened to distort competition “.... as it affects trade between MS...” through “... favouring certain undertakings or the production of certain goods ...”. A measure confers on recipients an advantage when it relieves them of charges that are normally borne from their budgets. The advantage may be provided through a reduction in tax burden in various ways, including reduction in the tax base⁵⁸⁹, a total or partial reduction in the amount of tax⁵⁹⁰, deferment, cancellation or even special rescheduling of tax debt. Furthermore, the advantage is granted by the State or through State resources through tax provisions of a legislative, regulatory or administrative nature as through the practices of the tax authorities.⁵⁹¹ The Commission is to prior authorise measures of state aid and the principles for the procedure have been laid down in a Council Regulation.⁵⁹² Where, however, a REIT regime finally does not provide (tax) benefits equally in comparable cases, thus, creates an economic advantage to the (domestic) REIT and its shareholders, which cannot be justified by the nature or general scheme of the tax system and will be considered selective under the State Aid rules.⁵⁹³ Even the Council

⁵⁸⁹ See i.e. such as special deductions, special or accelerated depreciation arrangements or the entering of reserves on the balance sheet.

⁵⁹⁰ See i.e. such as exemption or a tax credit.

⁵⁹¹ Where i.e. a loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure. This criterion also applies to aid granted by regional or local bodies in the Member States (see Case C-248/84, “Germany v. Commission”, (1987), ECR 4013).

⁵⁹² A measure in this respect crossing the line to what shall and may be compatible with the internal market is listed in Art. 107 II and III. The listed criteria are of very broad nature only (see Council Regulation (1999)).

⁵⁹³ See the “Finish REIT” case, where the Commission held the selective tax benefits provided under MSs REIT regimes with its tax transparency in general and the levy of withholding taxes to distribution of dividend payments by MSs subject to the State Aid rules of the Treaty. With the decision to authorise the Finnish REIT regime, the Commission indicated its willingness to accept regimes that provide full transparency for indirect investment, provided that the regimes do not lead to any delay in taxation such as the creation of a special tax reserve that might benefit specialised investment as in real estate (see Stoschek/Kröger (2010), p. 19).

Regulation, however, focus on the approval process rather to giving an answer as to the quality of a measure such as the tax exception for REITs under a MS regime and its compatibility with the state aid rules.⁵⁹⁴

However, the research focus on cross-border situations and the direct tax treatment applied to non-domestic actors in the Host State. Thus, activities by MS that are not directly focused to foreign residents operating domestic, rather those measures focus on domestic residents to assist its (domestic) activities and, thus, indirectly influence markets and discriminate foreign resident companies that are acting in the same markets whether they are domestic or non-domestic are not of scope for this thesis and are not further evaluated in detail though.

4. Secondary European law

Secondary law is primarily based upon Directives. Hereto, the Treaty is providing in Art. 50 and Art. 53 authorities for the issuing of a secondary measure i.e. by way of a Directive. Especially in the field of the freedom of establishment a considerable number of Directives have been enacted i.e. in the harmonisation of the corporate law of MS⁵⁹⁵ and the introduction of “supranational” legal forms for companies⁵⁹⁶.

However, these types for legal forms may be used within the EU but are not solving issues of conflict of laws emerging from cross-border activities of companies established according to MS national laws. Rather, these legal forms provide new types of companies that are acknowledged by the MS but do not

⁵⁹⁴ It took until May 2010 when the Commission was to assess a MS REIT regime for the first time. Starting in 2009 the Finish government notified the Commission about their plans to introducing the Finish REIT regime. The F-REIT was focusing to promote the domestic residential market asking the Commission to assess the regime under EU state aid rules. (see State Aid No. N131/2009 – Finland Residential Real Estate Investment Trust (REIT) Scheme and Commission notice published in OJ C 68, 6.3.1996, p. 9).

⁵⁹⁵ Examples for the harmonisation of the corporate laws of MSs are i.e. the Merger-Directive or the Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies on the creation of a legal instrument allowing the limitation of liability of the individual entrepreneur within the European Union (EU) and repealing Directive 89/667/EEC. For a more detailed listing see Schwarze (2007), pp. 73-75.

⁵⁹⁶ Such forms of companies include the introduction of the European Economic Interest Grouping (EEIG) with Council Regulation (1985); the European Company (Societas Europaeae, SE) with Council Regulation (2001) and the European Cooperative Society (ECS) with Council Regulation (2003).

solve i.e. situations of different treatment of a REIT established in one MS taking operative actions in another MS or even is moving its central place of management cross-border in the territory of another MS. These situations are dealt with provisions of the international company law.

5. International Company law

The recognition of REITs in the EU and by MS is linked to the international company law, which builds part of each MS' domestic law.⁵⁹⁷ International Company law is answering the question as to which law is applicable to situations of a company going cross-border and may be applied to the company by the other state. However, in cross-border situations international corporate law applies for the determination of the local law to be applied only where this is not subject of multilateral international agreements⁵⁹⁸ or under EU law already. Even though, this is not the case for the transfer of a seat of a company from one MS into another it is still true question arises whether there is room for the application of domestic law even to a limited extent. This question, however, may be relevant only, where domestic law is in compliance with EU law since the latter is overriding. Domestic law may, therefore, be applicable only to the extent it is viewed to being compliant with EU law. Since MS have to comply with direct applicable EU law i.e. the freedoms domestic law may only be applicable to a limited extent only. Thus, EU law is the overriding law to which domestic law is subsidiary. Thus, the question which of two different principles in use in the EU by MS domestic corporate laws, which are (i) the "real-seat"-principle⁵⁹⁹ and (ii) the "incorporation"-principle⁶⁰⁰ is not subject to international corporate law, rather EU law and its freedoms though.⁶⁰¹

⁵⁹⁷ See Hofmeister (2007), 868 et seqq.

⁵⁹⁸ An attempt for such a multilateral agreement in 1968 an agreement was signed under the use of Art. 293 on the mutual recognition of legal persons and companies. This was envisaged by way of establishing a principle that was a combination of the real-seat and the incorporation theory. However, the agreement failed due to the missing ratification by the Netherlands government, thus was never implemented (see for the text of the Agreement in ZGR 1999, 159 et seqq.).

⁵⁹⁹ Other terms for "real seat" in use may be "siège reel", the "centre of administration" or the "centre of control and management". This principle is applied in the corporate laws of most of the MSs e.g. Germany, France, Italy, Spain, Portugal, Greece and Belgium (see Wouters (2001), p. 107).

⁶⁰⁰ Other terms for the "incorporation principle" in use are "theory of domicile" or "siège statuaire theory". Currently, there are nine MSs that follow the seat principle while six follow the

6. Conclusion

The fundamental freedoms analysed above bear significant potential to open the door into MS' domestic legal regime for economic harmonisation. These free movement provisions pursue market integration through market deregulation.⁶⁰² Additionally, the freedom of movement of services is to mention in this context as well but is subordinate. Clearly, the freedom of movement of capital and the freedom of establishment setting the conditions MS REIT regimes have to test against and to comply with. In exercising their direct taxation powers, MS may not discriminate, directly, or indirectly, on the basis of nationality and may not impose distinctions or restrictions that could be regarded as an infringement of these freedoms.⁶⁰³ From an Investor point of view all investment scenarios I. – V. fall under the scope of the Treaty' freedoms. Except for the case of direct cross-border investments into real property all other scenarios fall under the scope of the freedom of establishment as well as the freedom of movement of capital.⁶⁰⁴ Whereas, investment scenario I does built case for neither primary nor secondary establishment. However, the scenario falls under the capital provisions though.

Table III.6-1: Investment scenarios in scope of the Treaty - summary

Investment Scenario	Scope of freedom	Source	Justification / Derogation of restrictive measures
I.	Freedom of Establishment	n/A	n/A
	Freedom of Movement of Capital	Article 63	Article 65 I ("tax law")
II.	Freedom of Establishment	Article 49 II ("primary establishment")	Article 52 ("basic interest of society")
	Freedom of Movement of Capital	Article 63	Article 65 I ("tax law")

incorporation principle e.g. Netherlands, IK, Ireland, Denmark, Sweden and Finland (see Drury (1998), pp. 168-169, 182).

⁶⁰¹ The discussion regarding Company's "residence": real seat vs. incorporation principle is therefore not further discussed in this thesis. For further reading see i.e. Siems (2002), p. 48; Roth (2003), p. 181 et seqq.; Kersting/Schindler (2003), p. 1284 as well as i.e. ECJ Cases, the trilogy of cases: "Überseering", "Centros", "Inspire Art" and "Daily Mail".

⁶⁰² See Weatherill (1995), p. 225.

⁶⁰³ Especially, the State Aid rules that are mostly disregarded in Literature provide additional source to conditions for compliancy of national REIT regimes with European law that was exemplified shown with the Commission's decision on the F-REIT though (see i.e. Cornelisse (2006 Part 1) and EPRA (2009)).

⁶⁰⁴ See Table III.6-1.

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE

MSs REIT regimes and EU law

III.	Freedom of Establishment	Article 49, 55	Article 52 ("basic interest of society")
	Freedom of Movement of Capital	Article 63	Article 65 I ("tax law")
IV.	Freedom of Establishment	Article 49, 55	Article 52 ("basic interest of society")
	Freedom of Movement of Capital	Article 63	Article 65 I ("tax law")
V.	Freedom of Establishment	Article 49 I ("secondary establishment")	Article 52 ("basic interest of society")
	Freedom of Movement of Capital	Article 63	Article 65 I ("tax law")

Source: Original by W. Speckhahn

Therefore, a foreign REIT crossing border into another MS can validly rely on the freedom of movement of capital and the freedom of establishment for its activities, thus, expect and demand not to be restricted and to be treated in a non-discriminatory way. Here, the difference in between the freedoms relevant becomes important. One of the striving differences between the freedom of movement of capital and the other freedoms is that there is a more extensive list of express derogations available in respect of capital.⁶⁰⁵

However, the REIT will meet the suspect provisions identified above within s REIT regimes though.⁶⁰⁶ Focusing on the provisions of REIT regimes in other MSs they face the freedoms already outlined together with the State Aid rules building the provisions that are relevant for the compliant test of MSs REIT regimes. Therefore, the rules and provisions identified in MSs REIT regimes that have been labelled to being suspect of discrimination should comply with the freedoms objective or, otherwise, justified where available. All of the suspected provisions are as a result of the analysis of the formal freedom conditions in violation with their objectives. The identified provision for legal requirements, here especially those relating to the legal form for the domestic REIT, its domestic residence and listing requirement apply primarily to domestic and foreign REITs equally. However, they constitute an indirect discrimination while ignoring the fact i.e. that a foreign REIT was established legally in its MS already, thus, should not be subject to additional requirements though. Therefore, these provisions hinder the

⁶⁰⁵ See Barnard (2004), p. 482.

⁶⁰⁶ See Table III.6-2.

establishment of companies in their territory by asking to comply with additional conditions and, thereby, not treating the foreign company equally to resident ones. This is clearly a violation of the freedom of establishment. Furthermore, setting up additional conditions for non-resident companies and shareholders investing in domestic companies (i.e. the limitation to non-resident and certain types of shareholders) restrict the movement of capital, thus, violates the freedom of movement of capital as well. This holds true for the tax treatment of non-residents as well. Since almost all MSs levy withholding tax at the level of the REIT for distributions made to foreign shareholders but not to its domestic residents, discrimination based on residence and, therefore, violation of the freedoms is concerned as well. Furthermore, the discriminatory treatment of non-residents may violate the freedom of movement of services but is residual to the violation of the freedom of establishment and the freedom of movement of capital though.⁶⁰⁷

Table III.6-2: Restrictions to the Treaty – Summary of suspect provisions

Criteria	Condition	Requirement	Suspect restriction
Legal requirements	Legal form	Form under domestic (corporate) laws	Freedom of establishment
			Freedom of movement of capital
	Residence	domestic / registered	Freedom of establishment
			Freedom of movement of capital
	Listing	domestic stock	Freedom of establishment
			Freedom of movement of capital
	Shareholder requirements	limitation for non-resident shareholder	Freedom of establishment
			Freedom of movement of capital
			State Aid
	Asset test	domestic property only	Freedom of movement of capital
			State Aid
Tax treatment	Tax transparency	Option used to “license” for domestic REIT regime	Freedom of establishment
			Freedom of movement of capital
	Legal requirements	Compliance with conditions under domestic regime (ex. Residence / Legal Form)	Freedom of establishment
			Freedom of movement of capital
	Withholding tax on dividend payments	non-resident shareholder	Freedom of establishment
			Freedom of movement of capital

⁶⁰⁷ See Sec. 3.3 above.

			State Aid
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Source: Original by W. Speckhahn

However, the provisions in MSs REIT regimes are not subject to the freedoms only. Rather, the Treaty provide for further ground on which basis hindrances to free movement by way of distortions of competition be assessed and must comply with. Hereto, the Treaty provides under the State Aid rules for provisions that prohibit MSs to granting of aids through state resources that affects trade by distorting competition. Hereunder, provisions that limit shareholdings in domestic REITs by setting up of maximum quota for non-residents as well as the limitation of tax beneficial treatment of investments in domestic property (Asset test) and the benefits of tax treatment under the REIT regime in general represent Staid Aid under the state aid rules.⁶⁰⁸ Where tax benefits are granted to residents only the flip side is a loss of tax revenue from such activities by residents that lower the state resources. Thus, to limit tax beneficial treatment to residents constitutes a selective measure under the State Aid rules and distorts trade negatively.⁶⁰⁹

Applying the freedoms objectives consequently, there is neither need nor any conditional requirement under Art. 49 I (secondary establishment) to setting up a dependent subsidiary in that other MS before being eligible for the freedom and acknowledged⁶¹⁰ under another MS' corporate and tax laws and consequently its REIT regime as well. Consequently, a company moving cross-border within the EU enjoys the right for equal treatment compared to residents while any restrictions may be justified for reasons limited to those of non-discriminatory type and with reference to the basic interests of society as well as the principle of proportionality is observed. Where, however, a MS does not provide for a (special) REIT regime thus does not provide for different (tax) treatment to companies operating in the filed of real estate, there is no restriction set by treating the foreign (REIT) Company according to the ordinary domestic laws applicable unless difference is being made in comparison to domestic companies. In this case, again, discrimination on grounds of nationality becomes visible but will not be

⁶⁰⁸ See Sec. 3.4 above.

⁶⁰⁹ Ibid.

⁶¹⁰ See Case "Centros" with further reference to Case "Cassis de Dijon" and its "Cassis de Dijon" principle.

further developed since this situation is out of scope of this analysis though. Therefore, where MSs REIT regimes do not provide for foreign REITs to opt for the domestic REIT regime in order to benefit from beneficial treatment under the regime generally discriminates the foreign REIT purely on grounds of nationality. This conclusion must not be subject to the fulfilment of the domestic statute elements or other conditions whatsoever by the foreign REIT. Where a REIT is validly established in one MS going cross-border into another MS it must be acknowledged according to the “Cassis de Dijon” principle.⁶¹¹ Thus, any different treatment, unless justifiable, violates the freedoms and is subject to further analysis in light of the ECJ case law in the following chapter.

⁶¹¹ See Micheler (2000), p. 180/181.

Chapter IV: MSs REIT Regimes and ECJ Case Law

1. Objectives for this Chapter

In the previous chapter “hard” EU law relevant for MSs REIT regimes with focus to their respective rules towards the treatment of cross-border situations was discussed. Hereto, the Freedoms and especially the freedom of movement of capital and the freedom of establishment impact the MSs and its legal order.⁶¹² As a result there are requirements of MSs REIT regimes, which are suspicious of hindering the freedoms, thus, violating EU law. The provisions suspect of violating EU law are found especially with the legal requirements and tax treatment in cross-border situations.⁶¹³ Therefore, assessing the benefits of REITs is no longer limited to the MSs specific countries of domicile.⁶¹⁴ However, as seen above, reality proof different since REITs are treated differently depending on its residency and foreign REITs, even equally legally, the tax treatment is different.⁶¹⁵ The fact that some MSs do not allow foreign legal entities or non-residents to opt for it domestic REIT status creates an economic disadvantage in a cross-boarder situation. In disallowing such an option, the MSs would seem to be protecting their domestic markets.⁶¹⁶ Thus, it becomes visible that rules or parts of MSs REIT regimes i.e. conditions to the legal requirements and tax treatment are suspect of being not compliant with EU law violating the freedoms being discriminatory on grounds of nationality.⁶¹⁷ However, since there is neither competence with the EU, thus, nor the ECJ, in the field of direct tax, the question is, whether the freedoms have any impact on MSs legal order in direct tax though.

Hence, the analysis will focus to cross-border situations of a foreign REIT entering into the market of another MS, which provide for a domestic REIT regime meeting its conditions set out for companies to legally qualify for treatment according to the

⁶¹² See Table III.6-1.

⁶¹³ See Table III.6-2.

⁶¹⁴ Standard & Poor's (2005), p. 16.

⁶¹⁵ See Hughes/Lewis (2008), p. 95 who conclude that MSs REIT regimes are usually based on the idea that a domestic REIT will invest domestically only.

⁶¹⁶ See Chapter II, Sec. 5.1, 5.4; Chapter III, Sec. 3.1, 3.2 and 6.

⁶¹⁷ See especially Art. 18.

(domestic) REIT regimes to answering the question whether the foreign REIT must comply with the domestic criteria for REIT treatment in full or any other (lower) level of “comparability” should suffice. Furthermore, the “compliance test” will analyse MSs REIT regimes to identify the existence of “misfit”, thus, impact of the EU through the freedoms⁶¹⁸ and potential harmful practices in MSs legal order. Notwithstanding, it is out of scope of this thesis to develop discriminatory and/or distorting elements in full and in detail, but in particular conditions to opt for status under the legal requirements and tax treatment in cross-border situations are analysed for being suspect of a harmful practise though. Therefore, this chapter will focus on:

- the identification of the basic principles set out by the ECJ with its judgments relevant and applicable in direct tax, thus, representing impact of the EU;
- providing for material that creates basis for the analysis of “misfit” by MSs REIT regimes and its respective tax treatment rules;
- the legal requirements and the situation of foreign legal entities or non-residents to opt for REIT status analysed with respect to the creation of an economic disadvantage in a cross-border situation;
- testing the “fit” of such a protectionist approach as to whether the “common understanding” model of the European REIT infringes the fundamental freedoms, thus EU law;
- identifying adaptational pressure on MSs REIT regimes.

Thus, this chapter is to identify EU “hard” law as it resulted from ECJ judgements by which the ECJ interprets EU law and in this context the meaning and reach of the freedoms within and for the internal market. Herewith, “misfit” of MSs REIT regimes and together with identifying conditions for compliance adaptational pressure, thus, the impact of the EU becomes visible.

⁶¹⁸ See Chapter III, Sec. 3 for a detailed discussion on the freedoms relevant to this discussion.

2. The ECJ case law

2.1 Additional secondary source of law

The case law by the ECJ does not constitutionally built part of the EU primary law. However, the ECJ has since long repeated that MSs must exercise their legislative powers consistently with Community law.⁶¹⁹ This includes especially the prohibition of discrimination and the freedoms of the Treaty building part of the EU' economic constitutional framework.⁶²⁰ In its role the ECJ provide an additional secondary source of law to add to the administrative acts found in Art 249. Hereto, there is clear acceptance within the EU that the ECJ provides definitive and authoritative judgements that is the interpretation on points of EU law which are followed by the courts of the MSs. Especially, in the field of direct taxation, where the EU has no significant competences effect is shown by the concept of the ECJ to enforce the general principles of EU law in areas, which do not fall under the competence of the EU. Hereto, the general principles of EU law to which the ECJ refers comprise the fundamental freedoms especially.⁶²¹ Consequently, non-harmonised MSs corporate laws and tax regimes must comply with EU law i.e. the fundamental freedoms even though there is no explicit competence for by the EU and its institutions.⁶²² The assessment of national tax laws considering the fundamental freedoms is not limited anymore pursuant to Art. 49 and 63 rather orients themselves primarily on the case law provided by the ECJ decisions.⁶²³

This holds true especially with a view to potential justifications and applicable derogations under the freedom of movement of capital. Where, however, research is going beyond the case law of the ECJ is analysed as well but limited to the judgments on related fields of law i.e. on indirect tax law cases. In addition the

⁶¹⁹ See i.e. Case C-182/08, "Glaxo Wellcome GmbH & Co. KG v Finanzamt München II", (2009), ECR-I 8591, para 34 and the case law cited, Case C-155/09, "Commission v Greece", (2011), ECR I-00065, para 39 and recently joined Cases C-338/11 to 347/11, "Santander Asset Management SGII SA v Directeur des residents à L'étranger et des services genereaux" et al. (Case "Santander"), (2012), judgement of 10 May 2012, not yet published, para 14.

⁶²⁰ Schwarze (2007), p. 28.

⁶²¹ See Xenopoulos (2006) for a comparative law overview on the application of the fundamental freedoms in the field of direct taxation.

⁶²² Wunderlich/Albath (2005), p. 549 et seq.

⁶²³ The ECJ becomes involved in direct taxation matters following an infringement procedure initiated by the Commission under Art. 258 or by a MS according to Art. 259 as well following the request by a national Court of a MS for a preliminary ruling concerning the interpretation of EU law according to Art. 267 et seqq. (see Rettig/Protzen (2003), p. 196).

influence by ECJ case law on direct tax is possible to make visible while extending the view for analysis to cases in other fields of the law i.e. consumer law and corporate law cases. The question, therefore, arise whether there have been decisions by the ECJ already determine domestic regimes or its rules being prohibitive and discriminatory.

2.2 Scope of Cases

There have been, however, no cases brought to the ECJ from a national Court regarding a REIT established in a MS under its Home State regime, which was invested in a REIT in another MS where the Host State does not provide the benefits under its domestic REIT regime. This situation proves the author's thesis that there is no sensitiveness on domestic level for cross-border investments either by individuals or corporate and not by REITs in another MS. But there are cases on which the ECJ had the opportunity to decide on and where MSs can apply the findings to the existence of infringements with its REIT regimes. These cases are those in the fields of product, company and tax law where the ECJ already assessed MSs rules and regulations not being compliant with the Treaty i.e. by infringing the freedom of movement.

However, there have been numerous opportunities for the ECJ to analyse MSs tax regimes and its compliance with EU Law in recent years. Although the Treaty does not provide for any competence on direct taxation⁶²⁴, the ECJ had opportunities to judge indirectly on regulations within MSs tax regimes suspect of violating the freedoms. Where extent case review and academics focus on tax cases mainly decisions on other legal topics have to be taken into account and to be analysed. The cases coming to the ECJ are predominantly on tax treatments and being of discriminating nature. Details on the interpretation of the freedoms scope and objectives are given with numerous decisions especially in the fields of corporate and tax law, but in other fields and cases as well. These cases are being found outside the obvious "tax court", i.e. from the corporate law or even consumer product law. All together, these cases and its decisions have to be set into context and to combined to deriving kind of commentary to the framework set for European REITs under the regime of the Treaty's freedoms applicable.

⁶²⁴ See Chapter III, Sec. 2.2.

However, according to the scope of this thesis focus is given to cross-border activities of a REIT. Besides focusing to prominent cases, which are presented and analysed in detail, broad overview on the case law relevant is provided though.

3. Leading ECJ Cases

Starting point for the analysis of the ECJ case law and its impetus towards harmonisation of MSs corporate and tax laws is the analysis of early decisions by the ECJ outside the corporate and tax court. These basis of decisions have resulted in somewhat guiding principles for the jurisdiction by the ECJ in the following years. Thus, taking a closer look at those cases and its general principles developed by the ECJ starts the puzzle to build the case for the applicable case law to REITs in the EU and the impacts for MSs REIT regimes.

3.1 Case “Dassonville”

In the early years of the EU and the time of the activities towards the internal market cases coming to the ECJ have been in the context of the freedom of movements of goods as goods play the dominant role in trade between countries traditionally. In its Case “Dassonville”⁶²⁵ the ECJ had the opportunity to giving a “... radical interpretation of the internal market ...”⁶²⁶ by stating:

*“All trading rules enacted by the MS which are capable of hindering, directly or indirectly, actually or potentially, intra Community trade are to be considered as measures having effect equivalent to quantitative restrictions.”*⁶²⁷

Even Case “Dassonville” was on the free movement of goods and on the interpretation of measures having equivalent effect to quantitative restrictions a

⁶²⁵ Case C-8/74, “Procureur du Roi v Benoît and Gustave Dassonville” (Case “Dassonville”), (1974), ECR 837. In this case the ECJ indicated that a Belgium requirement that importers of Scottish whisky possess a British certificate of authentication was incompatible with Article 30 EC Treaty (now, post-Lisbon Treaty, Article 34). The rule favoured direct importers over traders importing Scotch whisky into Belgium from another MS in which the goods were already in free circulation. Thus, the ECJ found that the rule “channelled” trade (see Weatherill (2003), p. 344) and distorted the market (see Case “Dassonville”, para 9).

⁶²⁶ Richardson (2001), p. 188.

⁶²⁷ See Case “Dassonville” for the so-called “Dassonville-Formula”, para 5.

concept under the freedom of movement of goods it should be considered elsewhere as well. The principles developed around the freedom of goods are regularly applied by the ECJ to cases not limited to those related to goods only,⁶²⁸ thus, they are relevant for the analysis of any restrictions to REITs as well.

The importance of the definition on the internal market given by the ECJ in Case “Dassonville” was not on the conditions to the internal market as a framework itself rather on the conditions according to which national measures have to be assessed towards their compliancy with EU law, especially the freedoms of the Treaty. According to the definition above, known as the “Dassonville-Formula”, it is not necessary to actual effect on trade between MSs as long as the measure is capable of such effects.⁶²⁹ With this wide interpretation, in effect, the Dassonville-Formula include both type of measures distinct and indistinct ones but discriminatory intent is not required. However, Art. 34 is in breach if and when a measure effecting import is too far “uncertain and indirect”.⁶³⁰ But, in turn, a measure may be lawful if the action seeks to prevent unfair practices in a manner which conformed with Community law, if the measures used were “reasonable” and not affecting intra-Community trade.⁶³¹

The development with the Case “Dassonville” by the ECJ was to state a somewhat “rule of reason” referring directly to Art. 36 and, herewith, required the MSs to justify its laws.⁶³² Here, the ECJ has reflected two components in its case law: The MSs must show an “end” recognised by Community law which is served by the challenged measure and it must show that the “means” chosen to achieve that end is “... reasonable ...”⁶³³ and, therefore, permissible. Additionally, the

⁶²⁸ See for example Case “Gebhard”.

⁶²⁹ See joined Cases C-177 & 178/82, “Criminal Proceedings against Jan van de Haar and Kaveka de Meern BV”, (1984), ECR 1797, para 13.

⁶³⁰ See Case C-379/92, “Criminal proceedings against Matteo Peralta”, (1994), ECR I-3453, para 24.

⁶³¹ The ruling was here broader in scope than suggested by Directive 50/70/EEC, concentrating on the effect of national action effectively ignoring its form, and seemed to indicate a determination on the part of the ECJ to use Art. 34 to pursue all restrictive national laws that have the effect of hindering Intra-Community trade but leaving on the other hand room to the MSs to regulate their markets by taking actions as long as the area of action is not regulated by the Community (See Weatherill (1995), p. 226; Case C-155/80, “Summary Proceedings against Sergius Oebel”, (1981), ECR 1993, para 12).

⁶³² See i.e. Case C-34/79, “R. v. Henn and Darby”, (1981), ECR 3795, para 12-13.

⁶³³ See Case “Dassonville”, para 6.

“means” are used restrictive by the ECJ and has insisted that measures are “reasonable” only where the MS demonstrates that the means to achieve that end are the least restrictive for trade.⁶³⁴ Thus, “... discrimination is not the key ...”,⁶³⁵ rather the restrictive effect in inter-State trade is essential.

The jurisdiction by the ECJ in the context of discrimination in intra-Community trade started with Case “Dassonville” to construct a body of interpretation, which is not blindly linked to Art. 34 rather give more space to cover cases, which are not by wording but have to be covered by the objectives of the Treaty’ “market integration”. But, the very relevance of the Dassonville-Formula does not give an answer to the compliance of MSs restrictions towards non-domestic REITs since the Formula was somehow broad still as to the criteria of what may be “reasonable” restrictions. The decision just helped the MSs the adoption of Art. 34 measures, thus, giving guidelines for coming closer to one mutual understanding. However, not until the Case “Cassis de Dijon” further clarification on compliant restrictive measures by MSs became visible.

3.2 Case “Cassis de Dijon”

Case “Cassis de Dijon”⁶³⁶ provided significant impetus to the harmonisation process and being of the very basis for the understanding of the freedom of movement for companies but on restrictive measures as well. By applying the Dasonville-Formula the ECJ added:

“Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public

⁶³⁴ See Case C-42/82, „Commission v. France, (1983), ECR 1013 and Case C-40/82, “Commission v. United Kingdom”, (1982), ECR 2793.

⁶³⁵ See Weatherill (2003), p. 344.

⁶³⁶ Case “Cassis de Dijon” was a straightforward product requirement case concerning the composition of fruit liqueurs. The German law required fruit liqueurs to have a minimum alcohol content of 25%, whereas, the French Cassis had an alcohol content of only 15 – 20%. The ECJ said, that “in the absence of common rules (i.e. harmonisation) it is for the MSs to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory” (para 8).

*health, the fairness of commercial transactions and the defence of the consumer.”*⁶³⁷

3.2.1 “Rule of Reason”

This statement became further known as the “rule for reason”, the first Cassis principle. Herewith, the ECJ further developed the application of Art. 34 to non-discriminatory technical standards. The ECJ displaced the Dassonville assumption that Art. 34 does not apply to a national measure, which makes no distinction, but may nevertheless hinder trade (indistinctly applicable measure), unless it could be shown that the measure discriminated between imports and domestic products or between different forms of intra-Community trade. Instead, the ECJ stated that the rule of reason might apply and save the measure from Art. 34 if it is necessary to meet the mandatory requirements. This is significant; since the mandatory requirements permitted under Case “Cassis de Dijon” are wider than the grounds provided under Art. 36.

The approach the ECJ has taken was the same emphasis on effect in common with Case “Dassonville” to abuse measures by MSs, which have restrictive effect on intra-Community trade. The application of Art. 34 in this field as corrective is, therefore, important. Under this rule MSs measures are “necessary” as long there is a lack of Community rules and they are insofar inadequate for “ends”. In order to define what is “necessary” to meet a mandatory requirement the ECJ referred to the principle of “proportionality”⁶³⁸ where it has to be proofed by the MSs that the measure in question is of less of a hindrance to trade.⁶³⁹ Still, Art. 34 is leading, while Art. 36 provide exceptions only “... although the extension of the available grounds of justification with Case “Cassis de Dijon” constitutes and extensive interpretation of the exceptions ...” as Cruz⁶⁴⁰ concludes. However,

⁶³⁷ Ibid.

⁶³⁸ See Case “Cassis de Dijon”, para 44.

⁶³⁹ See for example product related cases i.e. Case C-178/84, “Commission v. Germany (German Beer Tax Act)”, (1987), ECR 1227, (1988) 1 CLMR 780 and Case C-407/85, “Drei Glocken GmbH and Kitzinger v. USL Centro-Sud and Provincia Autonoma di Bolzano”, (1988), ECR 4233: In both Cases found the ECJ a labelling clearly indicating the ingredients of the products sufficient to protect consumers and, therefore, ruled the measures in breach of Art. 34.

⁶⁴⁰ See Cruz (2002), p. 79.

states Hilson⁶⁴¹, “Case “Cassis de Dijon” left the precise scope of Art. 34⁶⁴² unclear ...” still.

3.2.2 “Rule of mutual recognition”

In this respect the second principle introduced by the ECJ with its decision in Case “Cassis de Dijon” is of much more importance creating the basis for judging discriminatory rules and measures by MSs. The second principle in order to “... judge the permissibility of regulatory diversity between MSs ...”⁶⁴³ was by suggesting that

“... there is no valid reason why goods which have been produced and marketed in one MS should not be introduced into any other MS ...”.⁶⁴⁴

These goods once lawfully produced and marketed in one MS should be free to be marketed in any other MS and will, therefore, *prima facie* comply with mandatory requirements of the MSs into which they are being imported. This can be rebutted by evidence that further measures are necessary to protect the interest concerned. Then, a national rule must not only pursue a legitimate objective but must be necessary and proportionate for the attainment of that objective. This rule has become known as the “rule of mutual recognition” which has according to Ward⁶⁴⁵ “... established a principle of de facto harmonisation ...”.

The principles established in Case “Cassis de Dijon” are “... strongly deregulatory ...”⁶⁴⁶ and mirror the Treaty’ impetus of integrating the market but does not condemn all obstructive national rules and, therefore, “... fills out the gaps ...”⁶⁴⁷ in Community law. As the very result Barnard⁶⁴⁸ concludes “dual regulation” (in the home and host state) is replaced with single regulation (of the home state) is to be respected by the host state under the principle of mutual recognition. In order not to creating the ground for a “race to the bottom” of standards or legal requirements

⁶⁴¹ See Hilson (1999), p. 446.

⁶⁴² Art. 34 that were Art 28 at that time pre-Lisbon.

⁶⁴³ See Weatherill (2003), p. 385.

⁶⁴⁴ See Case “Cassis de Dijon”, para 14.

⁶⁴⁵ See Ward (1996), p. 121.

⁶⁴⁶ See Weatherill (1999), p. 52.

⁶⁴⁷ See Weatherill (2003), p. 236.

⁶⁴⁸ Barnard (2004), p. 106.

set for products the ECJ recognized the mandatory requirements that are intended to place a brake to such developments.⁶⁴⁹

3.2.3 Excursus – Case “Keck”

The ECJ acknowledges that there are interests of the host state to be respected and fields not mentioned in Art. 36. Therefore, the ECJ established his closed list of restrictive measures, which may be respected without being *contra legem* to the Treaty’ impetus to free trade. However, by introduction of the “rule of reason” the ECJ tried to balance the need of applying Art. 34 with the need to respect the mandatory requirements justified under Art. 36. The balance, however, was later more clarified with the decision in Case “Keck”.⁶⁵⁰ While Case “Keck” was on “selling arrangements” rather on “product requirements”⁶⁵¹ and, therefore, not focusing on the issue in the context of this thesis, the new “rule”⁶⁵² in Case “Keck” “... was a step towards a rule-based approach and a step away from using only the doctrine of mandatory requirements and proportionality to police over-zealous application of Art. 36...”.⁶⁵³ In effect the ECJ has not changed the second principle of Case “Cassis de Dijon” rather it has limited the “unreasonable rigorous application of Art. 34”⁶⁵⁴ and “opened” the mandatory requirements list from an “effects-based”⁶⁵⁵ approach to an “intention-based”⁶⁵⁶ test saying that a measure is in breach while being discriminatory unless justified.

The approach taken by the ECJ in Case “Keck”, however, may be interpreted as being of “... consolidation rather confrontation ...”⁶⁵⁷ and expresses the strong view for a “... preference for private autonomy ... in the market over public

⁶⁴⁹ Ibid.

⁶⁵⁰ See joined Cases C-267/91 and C-268/91, “Criminal Proceedings against Bernard Keck and Daniel Mithouard” (Case “Keck”), (1993), ECR I-6097. The case was on the reselling of goods at a loss for the Seller. This violated French law forbidding such practices. The defendant submitted that the law restricted the volume of sales of imported goods by depriving them of a method of sales promotion and that it was therefore incompatible with Article 30 EEC Treaty (now, post-Lisbon Treaty) Article 34. Any restrictive effect on trade plainly affected all goods, not just imports.

⁶⁵¹ “Product requirements” should be understood as measures relating to the extrinsic or intrinsic characteristics of the “goods”.

⁶⁵² See Wils (1993), p. 475.

⁶⁵³ See Moore (1994), p. 201.

⁶⁵⁴ See Ward (1996), p. 122.

⁶⁵⁵ See Weatherill (1995), p. 226.

⁶⁵⁶ See Hilson (1999), p. 447.

⁶⁵⁷ See Chalmers (1994), p. 401.

regulation ...”⁶⁵⁸ as well as it “... reflects the Courts unwillingness to exercise power of review over local regulatory choices that do not damage the realization of economies of scale and wider consumer choice in an integrated market ...”.⁶⁵⁹ This type of “home state control”⁶⁶⁰ principle in Case “Keck” was, however, not without critics. But, the ECJ did not change the basic concept of mutual recognition allowing restrictions upon the basis of the rules of reason only still. Thus, focus shall be given to the reasoning for justification though.

3.2.4 The “Cassis de Dijon” - principle

The decision and principles established with Case “Cassis de Dijon”, however, are not limited to goods and products in terms of tangible assets. Rather, the term “product” in the meaning of Case “Cassis de Dijon” has a wider meaning using the term synonym for any kind of “product” that is subject to cross-border market activities. This include companies as well that is any company using either domestic legal form for its incorporation and must be acknowledged in any other MS as a company legally established, thus, has to be recognised under the other MS company laws as well. There is no such rule compared to Art. 54 I that extend the coverage of the freedom of establishment for persons with Art. 49 to companies though. However, ECJ’s case law provide proof for the thesis of the same application of the intentions of Art. 28 for “goods” to companies and both are summed up within the meaning of “products” under Art. 28 et seqq. to which evidence will be given further below with the detailed analysis of the relevant case law towards companies.⁶⁶¹

3.3 Case “Avoir fiscal”

With another leading Case “Avoir fiscal” ⁶⁶² the ECJ later was to set the level playing field for any justification of measures restricting i.e. the second principle of

⁶⁵⁸ See Weatherill (2002), p. 47.

⁶⁵⁹ See Weatherill (1996), p. 885.

⁶⁶⁰ See Chalmers (1994), p. 403.

⁶⁶¹ See Sec. 4 below.

⁶⁶² In Case “Avoir fiscal” the situation in question was about the French branch of a non-French (but EU resident) company that was subject to French corporate tax and, thus, comparable to a Company resident in France. France, however, granted tax credits to companies with their registered offices in France but not to those with only a branch or agency in France (and a registered office in another MS). Accordingly, the denial of an imputation credit to that branch in

Case “Cassis de Dijon” and has set out some of the basic understandings if not to say “principles” in “European” Company Law. The ECJ at that time stated already that the basis under which it considers potential harmful regulations are the four freedoms,⁶⁶³ which the ECJ in general understands under the meaning of the prohibition of discrimination.⁶⁶⁴ This case is the basis, although direct taxation falls within the sole competence of the MSs, they must nonetheless exercise that competence in accordance with the Treaty’s principles. The principles are laid down i.e. with the freedoms in the Treaty, thus, having priority.⁶⁶⁵

Developing its argumentation from Case “Cassis de Dijon” the ECJ followed, that while the company’s seat serves as the connecting factor with the legal system of a MS as it does nationality for individuals a company within the EU is free to choose its appropriate legal form in which to pursue activities in another MS.⁶⁶⁶ Consequently, referring to the “Cassis de Dijon”-principle the company legally established according to the law of a MS has to be acknowledged as such in another MS as well. Like with any product legally produced according to the law of one MS and transferred in another MS a company as well must not be excluded from legally operating within the territory of another MS.

3.4 Fundamentals of leading cases

Applying the second principle consequently to the situation of REITs in Europe which by way of either primary or secondary establishment move to another MS, different from their country of incorporation, MSs must not impose additional requirements for the non-domestic REIT to comply with. Rather, any MS must acknowledge the foreign REIT as a “product” legally established and, thus, being “legal” in any MS under its domestic laws as well without further restriction. In effect, any MS must recognise the standards of any other MS as equivalent to its

respect of dividends received from French companies when such credits would have been available to a French resident company breached what is now Art. 49.

⁶⁶³ See Case “Avoir fiscal”, para 24.

⁶⁶⁴ Thus, any measure will, therefore, regularly be confronted with the rule of proportionality. This holds true for the so-called “inbound”-case as well as for the so-called “outbound”-case. An inbound-case is given where the question is: Will a comparable resident being taxed more favourable towards the non-resident (but EU resident) taxpayer with his domestic activities? A so-called outbound-case is given where it is asked: Will a comparable domestic activity be taxed more favourable as the foreign comp (meaning in another MS) activity?

⁶⁶⁵ See Case “Avoir fiscal”, para 107.

⁶⁶⁶ See Case “Avoir fiscal”, para 18, 22.

own.⁶⁶⁷ Thus, when REITs crossing border direct discrimination is concerned where MSs REIT regimes require any REIT benefiting from the domestic regime to be resident domestically, thus, discrimination on grounds of the company's seat is involved. Whereas, indirect discrimination is at issue in cases additional criteria of differentiation are applied that lead to the same result.⁶⁶⁸ According to Case "Avoir fiscal" neither cases of direct nor indirect discrimination in the context of discrimination on grounds of a company's seat shall be justified under Art. 52⁶⁶⁹. Thus, equal treatment is also required in the field of taxation.⁶⁷⁰

Table IV.3.4-1: ECJ – Leading cases - overview

#	Date (Year of decision)	Reference (ECJ decision)	Case ("[Name]")	MS	Freedom of Treaty	Source (Thesis page #)	Tax
Leading Cases							
1	1974	8/74	Dassonville	BEL	Free movement of goods	83	Trading rules shall not hinder intra Community trade.
2	1979	120/78	Cassis de Dijon	D	Free movement of goods	89	MSs must recognise the standards of any other MS as equivalent to its own ("Rule of mutual recognition" from Cassis de Dijon principle).
3	1986	270/83	Avoir fiscal	F	Right of Establishment	89, 92, 109, 117	Companies are free to choose the appropriate legal form in which to pursue its activities in another MS (Host State) that freedom could not be limited by any type and measures of discriminatory tax provisions.

Source: Original by W. Speckhahn

⁶⁶⁷ See Barnard (2004), p. 105.

⁶⁶⁸ See Case C-330/91, "The Queen v. Inland Revenue Commissioners, Commerzbank AG" (Case "Commerzbank"), (1993), ECR I-4017, para 14.

⁶⁶⁹ Even though Case "Avoir fiscal" was on the freedom of establishment the argumentation by the ECJ is with direct relevance for the interpretation of the express derogations under Art. 65 for the freedom of movement of capital too. Hence, it follows from the Case "Avoir fiscal" that the argument of defending the internal cohesion of one MS' tax system shall not constitute a case under the express derogations of Art. 65.

⁶⁷⁰ See Wouters (1994), p. 73

4. Cases on Company/Corporate Law

4.1 Scope of analysis

As seen from the discussion in the previous section the freedoms have direct effect on the laws of companies and its establishment though. Especially with the freedom of establishment involved often companies and corporations are subject to the case at issue. Hereto, the ECJ was to decide most of its cases in the past years with its decisions in the last decade have become known and prominent. The milestones in the development of the freedom of establishment with the ECJ case law started with the decision in Case “Avoir fiscal”⁶⁷¹ where the ECJ clarified that Art. 54 leave companies free to choose the appropriate legal form in which to pursue its activities in another MS⁶⁷² leading to the result that ones the connection criteria⁶⁷³ are met and the company’ seat has to be considered as being formed in accordance with the law of a MS that “seat” serves for the company as the connecting factor with the legal system of a particular MS⁶⁷⁴ and has, therefore, the same function for companies as nationality has for individuals.⁶⁷⁵ Thus, with the freedoms directly applicable and downloaded to the MSs the ECJ adds further interpretation, which should have and further is about to influence MSs domestic company laws.

4.2 Basic principles for companies

This concept was later confirmed in Case “Segers”⁶⁷⁶ where the ECJ took an extensive view of the right of establishment accepting the incorporation principle⁶⁷⁷ and held, that a company may “...and pursues its activity only ... (in a

⁶⁷¹ See Case “Avoir fiscal”.

⁶⁷² See Case “Avoir fiscal”, para 22.

⁶⁷³ See Sec. 4.2 below.

⁶⁷⁴ See “Avoir fiscal”, para 18. This decision gives clarification in cases where the rule at issue is considered based on the location of the company’s registered office, thus its seat under the real seat doctrine. Based on the case presented the ECJ decided the case presented was of indirect discrimination that might be saved by objective justification and express derogations that did not appear according to the facts.

⁶⁷⁵ See Barnard (2004), p. 324.

⁶⁷⁶ See Case C-79/85, “Segers v. Bedrijfsvereniging voor Bank-en Verzekeringwegen, Groothandel en Vrije Beroepen” (Case “Segers”), (1986), ECR 2375. The case was about a company having its registered office in another MS, even though it did not conduct its operational business there. However, the director of that company was excluded from the national sickness scheme in the MS where the company did conduct its operational activities.

⁶⁷⁷ See Cerioni (1999), p. 64.

MS different from) ... the MS where its branch is established...".⁶⁷⁸ A MS treating that company different solely because its registered office was in another MS renders Art. 54 valueless.⁶⁷⁹ Having made this conclusion the ECJ seemed to consider the mere incorporation in a MS as amounting to "establishment", with the result of including, among the beneficiaries of the right granted by Art. 49 and 54, "de facto" pseudo-foreign companies as well.⁶⁸⁰

However, the following decision in Case "Daily Mail"⁶⁸¹ seemed to be a break up from the former lines of the ECJ's jurisdiction,⁶⁸² the ECJ ruled that the provisions on freedom of establishment conferred no right on a company incorporated in MS "A" and having its registered office there to transfer its central management and control to another MS "B" while retaining its status as a company incorporated under the legislation of MS "A".⁶⁸³ Since there had not been any harmonisation, the ECJ remarked that companies are creatures of national law, i.e. they exist only by virtue of the national legislation that determines their incorporation and functioning.⁶⁸⁴ Thus, transfer of a company's seat was considered to be outside the remit of the freedom of establishment in relation to both the Host State and the Home State.⁶⁸⁵

⁶⁷⁸ The ECJ, hereto, stated that: "...the fact that a company does not conduct any business in the MS in which it has its registered office and pursues its activity only in the MS where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter MS to deny that company the benefit of the provisions of Community law relating to the right of establishment." (see Case "Segers", para 16).

⁶⁷⁹ The ECJ ruled that Art 49 and 54 prohibited a MS from excluding the director of a company from a national sickness insurance scheme on the ground that the company had its registered office in another MS, even though it did not conduct any business there. The court said that discrimination against employees in connection with social security protection "indirectly restricts the freedom of companies of another MS to establish themselves through an agency, branch or subsidiary in the MS concerned" (ibid para 15).

⁶⁸⁰ See Timmermanns (1991), p. 136.

⁶⁸¹ See Case "Daily Mail".

⁶⁸² The former decisions have mainly dealt with individuals and their right to leave their home state granted on the basis of Art. 49 and Directive 73/148⁶⁸² without restriction, the Court in Case "Daily Mail" had to examine for the first time the application of the Treaty's rules to the case of primary establishment of companies (see Directive 73/148/EEC).

⁶⁸³ See Case "Daily Mail", para 24.

⁶⁸⁴ Ibid. The ruling in Case "Daily Mail" was in many quarters held to imply that then Treaty provisions on freedom of establishment could not successfully invoked in order to set aside national rules on primary establishment.

⁶⁸⁵ See Dyrberg (2003), p. 532. The allowance by the ECJ to take priority over Community law by national law is not part of Art. 54. Furthermore, Art. 54 is a direct applicable provision of the Treaty that means there is no need for any transformation into national law. Therefore, it seems likely that if the parties involved would have intended to establish a branch, subsidiary or agency only they could have successfully relied on Art. 49 exercising the freedom of (secondary) establishment in

The ruling was applauded in some MSs as "... a blessing of the real seat principle ...", ⁶⁸⁶ but the ECJ clarified later that non-equal treatment to comparable situations such as on the basis of different treatment of fiscal residence represents covert discrimination contrary to and a breach of Art. 49 and 54. ⁶⁸⁷ Furthermore, in Case "Centros" the ECJ confirmed this jurisdiction stating that a company lawfully established under the laws of a its Home State transferring its seat to a Host State does not represent a case of fraudulently circumventing the laws of the Host State though. ⁶⁸⁸ The ECJ argued that different legal conditions i.e. minimum capital requirements in the Home State of incorporation (UK) and the Host State (DK), does not entitle the Host State to refuse to register that foreign establishment. ⁶⁸⁹ Case "Centros" marked a milestone in the ECJ's jurisprudence on freedom of establishment while using the reasoning from Case "Cassis de Dijon" extending its principle of mutual recognition for goods "... to company's ..." freedom of establishment. ⁶⁹⁰ It suffices that a company complies with the laws of any MS once it has been lawfully established somewhere in the Community and, thus, may carry out its business anywhere else. ⁶⁹¹

This understanding already known as the "mutual recognition doctrine following from Case "Cassis de Dijon" was found confirmation in the following case law. In Case "X and Y" the ECJ said Article 49 prohibited the State of origin

another MS. This was later confirmed by the ECJ itself in Case C-200/98, "X AB v. Riksskatteverket" (Case "X and Y"), (1999), ECR I-8261.

⁶⁸⁶ The MSs applauded, however, the legal concept of the "real-seat" principle under their national laws (v. the "incorporation" principle) though (see Dyrberg (2003), p. 532).

⁶⁸⁷ In light of its case law in other areas of free movement, by which the rules on equality of treatment forbid all "covert" forms of discrimination leading, by means of other criteria of differentiation, to the same result as overt discrimination on grounds of nationality (see i.e. Case C-71/1976, "Jean Thieffry v Conseil de l'ordre des Avocats à la Cour de Paris", (1977), ECR I-00756, Case C-3/1988, "Commission v. Italy", (1989), ECR I-04035, Case "Commerzbank" and Case "Halliburton" where the ECJ confirmed that was in breach of Art. 49 and, herewith, impliedly extended the prohibition of restrictions to the de-establishment. (see Cerioni (1999), p. 70)).

⁶⁸⁸ See Case "Centros", para 24.

⁶⁸⁹ See Case "Centros", para 35.

⁶⁹⁰ See Opinion of Advocate-General La Pergola in Case "Centros", para 20.

⁶⁹¹ See Micheler (2000), p. 180/181. The decision has led to enormous commentaries in literature varying from the question of the validity of the real seat principle to the opening of a door of legally circumventing national laws being more restrictive. However, this discussion is out of scope of this thesis and, thus, not further evaluated (see for Literature to this discussion i.e. Dyrberg (2003), p. 532, Micheler (2003), p. 522, Barnard (2004), p. 323, Siems (2002), p. 50/51, Austrian Supreme Court (2000), p. 49 and Rappaport (2000), p. 631).

“... from hindering the establishment in another MS of ... a company incorporated under its legislation”,⁶⁹²

therefore, granting certain tax benefits to domestically operating company's only breaches Art. 49 as well as burdening of taxes hindering or precluding companies to move cross-border violate the freedom of establishment outlined in Case “Lasteyrie”.⁶⁹³ Therefore, any measures by MSs, which are linked with moving a company and potentially hinder the exercise of the freedom of establishment⁶⁹⁴, even simply from an economic point of view only.⁶⁹⁵ With the decision in Case “Inspire Art”⁶⁹⁶ the ECJ extended this understanding applicable not only obligating MSs to fully acknowledge that legal entities formed abroad may be subject to different rules than domestic entities, but to acknowledge the entire legal system of the state of incorporation.⁶⁹⁷

With the decision in Case “Inspire Art” the ECJ has widely opened the door for corporate restructuring within European Company Law and “... has torn down the last legal barriers for the unrestricted cross-border use of legal forms ...”⁶⁹⁸ for companies existing in the EU.⁶⁹⁹ This was seen in the following Case “SEVIC”⁷⁰⁰

⁶⁹² See Case “X and Y”, para 26.

⁶⁹³ See Case “Lasteyrie”; Kälén/Rödl (2004), p. 16.

⁶⁹⁴ As a consequence, it might be clear that there is no need to differentiate between cases of “inbound” (immigration) or “outbound” (emigration) relevance. Indeed, there are no good reasons why regulations of the MSs concerning the moving out of companies should not be covered by the freedom of establishment, whereas, regulations dealing with the moving in should be (see Roth (2003), p. 189).

⁶⁹⁵ Hereto, reference shall be made to Case “National Grid” where the ECJ held a national rule disproportionate, which provided for the immediate recovery of tax for unrealised capital gains at the very time of transfer of the place of management of the company as it was in the case of the main proceedings, whereas capital gains on the case of a transfer of the place of management within the Home State was subject to tax at the same time of the realisation of capital gains only. Such an immediate tax create a cash-flow disadvantage that is viewed not to be proportionate, thus, hinder the freedom of establishment (see Case C-371/10, “National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond / Kantoor Rotterdam” (Case “National Grid”), not yet published, para 37).

⁶⁹⁶ See Case C-167/01, “Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd” (Case “Inspire Art”), (2003), ECR I-10155, para 101.

⁶⁹⁷ See Kersting/Schindler (2003), p. 1290.

⁶⁹⁸ See Müller, (2009), p. 196.

⁶⁹⁹ MSs may still restrict the freedom of establishment provided the restriction is covered by Art. 52 or meets the criteria for being justified. Thus, it would be fair to state that the analysed jurisdiction cannot be viewed as an abolition of the real seat principle (see Xanthaki (2000), p. 7) but it has to be admitted that the effect of these judgements “... may be to erode the real seat principle still further ...” (see Barnard (2004), p. 324) to an extent of a de-facto dismissal (see Omar (2002), p. 454).

⁷⁰⁰ Case C-411/03, “SEVIC Systems AG” (Case “SEVIC”), (2005) ECR I-10805.

where the ECJ while dealing with extending the cross-border mobility of companies by applying the principle of freedom of establishment to cross-border mergers⁷⁰¹ built case beyond cross-border mergers, namely with respect especially i.e. to seat transfers.⁷⁰² It has built the way that the seeking of the “... most fitting corporate forms and corporate law rules ...” has been acknowledged to be the rationale underlying Art. 49 and 54.⁷⁰³

Recently, however, the ECJ presented with its judgments in Case “Cadbury-Schweppes”⁷⁰⁴ and Case “Cartesio”⁷⁰⁵ decisions providing for some shaping to the freedom of establishment, which can be seen as limiting company’s mobility to cross-borders for which previous case law has opened the door widely. In Case “Cadbury Schweppes” reliance to the freedom was provided only to companies that do not only look like a “company” but are not taking part in economic activities though. Only, where the incorporation “... reflects economic reality...”⁷⁰⁶ that company shall be recognised and, thus, eligible for protection under the scope of the freedom of establishment. Therefore, the “... incorporation must correspond with an actual establishment intended to carry on genuine economic activities in the Host State...”⁷⁰⁷ However, a valid “establishment” requires the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. Thus, presence alone of goods, i.e. real property in isolation or bank accounts does not, in principle, meet that definition.⁷⁰⁸ Otherwise, such establishment may be viewed as being a “wholly artificial arrangement”.⁷⁰⁹ That could be so in particular in the case of

⁷⁰¹ In Case SEVIC, the ECJ held that cross-border mergers “... constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market ...” (see Case “SEVIC”, para 19). However, the Merger Directive (Directive 2005/56/EC) has not made the decision in Case “SEVIC” superfluous, rather the statements made by the ECJ in this case will serve as a significant guideline for open issues and the interpretation of cross-border situations including those related to the Merger Directive since the latter provides for a simple, standardised tool to implement a cross-border merger within the EU (see Evers (2010), p. 19).

⁷⁰² Siems (2007), pp 307 et seqq.

⁷⁰³ See Vaccaro (2005), p. 1356.

⁷⁰⁴ Case C-196/04, “Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue” (Case “Cadbury-Schweppes”), (2006), ECR I-4585.

⁷⁰⁵ Case C-210/06, “Cartesio Oktató és Szolgáltató bt” (Case “Cartesio”), (2008), ECR I-09641.

⁷⁰⁶ See Case “Cadbury Schweppes”, para 65.

⁷⁰⁷ See Case “Cadbury Schweppes”, para 66.

⁷⁰⁸ See Case C-396/09, “Interdil Srl in liquidation v Fallimento Interdil Srl, Intesa Gestione Crediti, SpA”, (2011), ECR I-09915, para 64.

⁷⁰⁹ Ibid, para 68

“letterbox” or “front” subsidiary.⁷¹⁰ However, the sole use of tax efficient structures or tax benefits itself does not create an issue in general, that measures by MSs aimed at removing such advantages are a violation of Community law, except in situations where such advantages are themselves an abuse of Community law.⁷¹¹

In Case “Cartesio”⁷¹² the latest judgment on companies' mobility, the ECJ delivered a decision pointing out that a MS is not precluded to determine the connecting factor for a company incorporated under its national laws that MS is allowed to enact rules under its national law to define criteria for companies under which they may retain its status as a company holding legal personality under its national law though.⁷¹³ However, the ECJ made clear that this competence is limited to the extent national law completely forbids any kind of transfer of seat to another MS or requires the winding-up or liquidation prior to such a conversion.⁷¹⁴ Otherwise, the *obiter dictum* is confirming settled case law by stating that the freedom of establishment also covers the possibility of a company converting itself into a company governed by the laws of another MS – which is *de facto* the

⁷¹⁰ Ibid, with reference to Case C-341/04, “Eurofood IFSC”, (2006), ECR I-3813, paras 34/35.

⁷¹¹ See Case “Cadbury Schweppes”, para 75. In the parent-subsidary scenario, the CFC legislation applies to attribute to the UK parent the profits of the overseas subsidiary if it is located in a low tax jurisdiction. There are specific exemptions from the application of the CFC attribution of profits as well as a more general “motive” test under which the legislation will not apply in circumstances where the “main” purpose or reason for the arrangements was not to achieve a reduction in UK tax or diversion of taxable profits from the UK. The ECJ said it was for the national court to determine whether the “motive” exclusion was wide enough to ensure that the CFC legislation was applicable to only “wholly artificial arrangements” (see para 72).

⁷¹² Case “Cartesio” was about a limited partnership established and registered in Hungary. Under Hungarian law this form of firms requires that there is at least one general (unlimited) partner and one limited partner (See Hungarian Investment and Trade Development Agency, “Corporate Legislation”; available on: http://www.itdh.com/engine.aspx?page=itdh_corporate). Therefore, this form of company is comparable to the French “Société en Commandite simple” (SCS), the German “Kommanditgesellschaft” (KG) and the UK “Limited Partnership” (Ltd.) (see Dorresteyn (1994), pp. 26-27). The limited partnership wanted to transfer its central place of administration from Hungary to a MS adhering to the real seat doctrine to another MS, Italy, adhering to the real seat doctrine as well. However, Italy refused the application of “Cartesio” for registration in the Commercial register of the transfer of its company seat to Italy. Although “Cartesio” lacked legal personality according to Hungarian corporate law since the law did not provide for a company to transfer its seat abroad while continuing to be subject to Hungarian law as its personal law, the ECJ referred to “Cartesio” as a company and treated as such.

⁷¹³ See Valk (2010), p. 157; The ECJ held: “As Community law now stands, Articles 43 EC and 48 EC (Comment: Reference made to the Articles of the Treaty pre-Lisbon numbering which are today Articles 49 and 54) are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.” (see Case “Cartesio”, para 124).

⁷¹⁴ See Case “Cartesio”, para 112/113.

transfer of the registered office.⁷¹⁵ Therefore, once the connecting factor is established and as long as the connecting factor is maintained according to the national laws, a company is entitled to rely on the freedom of establishment.⁷¹⁶ Furthermore, with Case “National Grid”⁷¹⁷ the discussion became a spin back to the understanding that a company’s transfer of its registered seat does not affect its status as company under the laws of its Home State of incorporation. It shall, however, be noted that Case “Cartesio” was about a case of immigration into another MS, whereas Case “National Grid” was a case of emigration, viewed from the Home State of incorporation. Thus, the question is open for further interpretation from the ECJ following Case “Cartesio” to clarify cases from the view of the immigrating MS though. Nevertheless, it can be concluded that there is no difference with inbound or outbound cases as long as there is a simultaneous change of national law since companies are creatures of national law.⁷¹⁸

4.3 Summary on Company mobility in the EU

According to settled case law by the ECJ companies legally established according to the laws of a MS benefit from mutual recognition according to the “Cassis de Dijon” principle.⁷¹⁹ Especially with the trilogy of the Cases “Centros”, “Überseering” and “Inspire Art” the ECJ opened the door to the market of any MS for legal entities formed abroad.⁷²⁰ This holds true, even such companies have been established under conditions different, even lower, to those in the Host State: Moreover, they may not engage in business in their Home State since that country follows the incorporation principle and, therefore, may be viewed in another MS i.e. in a MS following the real seat principle not existing since the company may not legally established while not meeting the MS’ conditions though.⁷²¹

⁷¹⁵ See Case “Cartesio”, para 111-113.

⁷¹⁶ See Case “Cartesio”, para 110.

⁷¹⁷ See Case C-371/10, “National Grid Indus BV gegen Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam” (“National Grid”), (2011), ECR I-12273.

⁷¹⁸ See Cases “Daily Mail”, para 19; “Überseering”, para 67 and “Cartesio”, para 104.

⁷¹⁹ This holds true for cases of primary establishment that are inherent to Art. 49 I already, but as well for secondary establishment by implied recognition according to Case “Centros” too. This view has been confirmed with the decision in Case “Überseering” though. Furthermore, there is neither difference in view whether the company is assessed from the MS where the company is immigrating into, nor from the view of the MS of moving out (emigration) as the ECJ held in its case “Lasteyrie”.

⁷²⁰ See Müller (2009), p. 196.

⁷²¹ See Exhibit IV.4-1: Cases on company/corporate law – overview.

Thus, freedom of establishment for companies as a legally established “product” of the EU must not be restricted while “moving” within the territories of the MS and must be recognised as such by any other MS. Hence, the differences in MSs domestic laws towards conditions for the legal incorporation of companies i.e. the application of the real seat or the incorporation theory is not of relevance for companies to rely on the freedom of establishment. Hereto, the ECJ clarified with its decision in Case “Inspire Art” that the connecting factor for companies is the legal situation in its MS of incorporation. Either theory that MSs company law is subject to the company is to be recognised as such in other MSs even where the other MS might follow a different theory for a company’s establishment though.⁷²²

Thereby, the ECJ with its decisions changed considerably the possibility for national laws to restrict access to foreign companies to their national legal order and mobility is allowed⁷²³ granting foreign companies the right of transfer its seat into another MS while keeping their respective corporate form under which they have been established in their Home State. Each company shall, thus, be entitled to this right provided:

- the company has legally been formed and established under the law of one of the MSs⁷²⁴;
- having its residence in the EU⁷²⁵;
- holding legal personality under its Home State;
- having not been deprived of its legal personality at transfer under the Home State’s laws;⁷²⁶ and
- it does not represent a wholly artificial arrangement, but carries out genuine economic activity.⁷²⁷

⁷²² Ibid.

⁷²³ See Evers (2010), p. 6.

⁷²⁴ See Case “Cassis de Dijon” for the Cassis-de Dijon principle (see Sec. 3.2.4 above).

⁷²⁵ See Case “Dassonville” and Case “Avoir fiscal” (see Sec. 3.1 and 3.3 above).

⁷²⁶ See Valk (2010), p. 152, 159 with reference further to Ringe (2005), pp. 621f, 623-639.

⁷²⁷ A corporation is eligible for protection under the scope of the freedom of establishment. Therefore, the “... incorporation must correspond with an actual establishment intended to carry on genuine economic activities in the Host State...”. Otherwise, such establishment may be viewed as being a “wholly artificial arrangement” (see Case “Cadbury-Schweppes”, para 66, 68).

While Case “Cadbury Schweppes” provided for clarification on the limits of mutual recognition and room to prevent abuse of use, Case “Cartesio” again fuelled the discussion whether such distinction creates a case for conflict of laws in between MSs following the real seat doctrine v. those following the incorporation doctrine, thus, has to lead to a differentiation of future cases where cross-border situations may be at issue though.⁷²⁸ However, with Case “National Grid” the discussion became spin back to the understanding that a company's transfer of its registered seat does not affect its status as company under the laws of its Home State of incorporation⁷²⁹, but the question “... exactly which rules travel with the company when it moves within the Community is a topic that still will provoke considerable litigation in coming years ...”.⁷³⁰ Nevertheless, in case of a MS REIT crossing border into another MS must not necessarily transfer its seat to becoming recognised.⁷³¹ Though, the foreign REIT may operate its activities in the Host State directly as a foreign REIT.⁷³²

5. The Case Law on (direct) Tax

5.1 Scope of analysis

The cases and decisions in the field of company/corporate law analysed above and further political advancements⁷³³ in this field emphasise “hard” policies, which are downloaded to the MSs. They seem to provide a picture of “misfit” on MSs level with regard to MSs REIT regimes, but even though MSs REIT regimes may not “fit” with its legal requirements this must not uphold for its direct tax treatment. However, there has been extended jurisdiction by the ECJ in the field of tax law though.⁷³⁴ It is settled case law already that although direct taxation falls within the

⁷²⁸ It is out of scope of this thesis to evaluate on this subject further, thus, reference for this discussion shall be made to i.e. Valk (2010), pp. 161-165 with further references though.

⁷²⁹ See Case “National Grid”.

⁷³⁰ See Micheler (2003), p. 529.

⁷³¹ Since the focus of this thesis is given to cross-border activities not necessarily involving a transfer of seat of the company from its MS of incorporation to another MS for its new domiciliation, this case shall not be of focus for discussion further, rather focus is given to cases reflecting Investment Scenarios I. – IV. though (see Chapter II., Sec. 5.4.1).

⁷³² See Table II.5.4-1: Cross-Border investments – overview of scenarios.

⁷³³ Political activities are more detailed discussed in Chapter VII, Sec. 3 below.

⁷³⁴ A Commissions Report on ECJ cases on direct taxation (the “Commissions 2001 Report”) lists only 5 decisions before 1990, around 40 over the course of the 1990th and more than 35 cases between 2000 and 2005 alone (see: http://europe.eu.int/comm/taxation_customs/publications/)

sole competences of the MSs they must nonetheless exercise that competence in a manner consistent with EU law.⁷³⁵ As a consequence MSs national tax laws have been heavily influenced by the interpretation of the Treaty's freedoms provisions i.e. the freedom of establishment as well as the freedom of movement of capital. The Commissions 2001 Report⁷³⁶ already suggested orientation guidelines for uniform implementation of decisions by the ECJ concerning already existing verdicts but to call up the ECJ by using the back door for assistance and asking for interpretation of harmful tax regulations in MSs with respect of the political goal for tax harmonisation. Following the competences limited in taxation issues the "overwhelming majority of the cases decided by the ECJ deal with the compatibility of direct tax provisions of the MSs with the Treaty freedoms, in particular i.e. the freedom of movement of persons and companies and the freedom of movement of capital".⁷³⁷

According to the scope of this thesis' analysis the following focus on REITs in the scenario of cross-border activities and the tax treatment faced from its perspective as corporate and corporate shareholders.⁷³⁸ Hence, the case law concerning three types of activities are analysed that are direct activities in the Host State, those as shareholder in a corporate (REIT) in the Host State and it shall be identified the relevant ECJ case law to give information on the gaps left behind by the Treaty and its wording related to the freedoms. This will provide the understanding of the framework to cross-border situations and the conditions to MSs national REIT regimes to comply and "fit" with applicable EU law. In identifying these conditions the impact of EU "hard" policies becomes visible with situations of MSs having adopted such conditions already as a result of

taxation/document/court_cases_ direct_Taxation_en.pdf). For further cases listed see Malherbe (2008) and its annexes at the end of the study.

⁷³⁵ See Sec. 3 and 4 above as well as settled case law by the ECJ i.e. Case C-387/11, "Commission v Belgium", (2012), judgement of 25 October 2012, not yet published, which was most recently confirmed with Cases C-383/10, "European Commission v Kingdom of Belgium", judgement of 6 June 2013, not yet published para 40, and Case C-296/12, "Commission v Belgium", (2014), Judgement of 23 January 2014, not yet published, para 27.

⁷³⁶ See Commissions 2001 Report.

⁷³⁷ See Malherbe (2008), p. 10.

⁷³⁸ See the potential "investment scenarios" in Chapter II, Sec. 5.4.1. therefore, the case considering taxation of individuals and those decisions on companies and shareholders in "inbound cases" will not be further evaluated except for those cases of cross-border situations that are of relevance for REIT activities in "outbound cases".

downloading or where MSs REIT regimes “misfit” with some of their criteria i.e. direct tax rules resulting in adaptational pressure though.

5.2 Principle of “equal treatment”

The basic “principle” to direct taxation was provided by the ECJ with Case “Schumacker”.⁷³⁹ Even though, the case was about an Individual and its eligibility for benefits under personal income tax regulations, the decision is of wider impact for the general understanding of the conditions for the compliancy of national tax regimes with EU law. In its decision, the ECJ accepted differential treatment in cases where MSs apply different tax rules or tax systems to resident and non-resident since these two categories of persons are generally not comparable.⁷⁴⁰ However, any differentiation might, depending on the circumstances, constitute discrimination if

*“there is no objective difference between the situations of the two such as to justify different treatment in that regard”.*⁷⁴¹

This concept of justifying differential treatment based on residency became known as the “Schumacker doctrine”.⁷⁴² The “principle of equal treatment”⁷⁴³ builds ground to limit differential treatment in the field of taxation⁷⁴⁴ provided, however, non-residents undertake significant economic activity in the Host-State that the “... two situations be comparable ...”.⁷⁴⁵ According to Case “Wielockx”⁷⁴⁶ a

⁷³⁹ See Case C-279/93, “Finanzamt Köln-Altstadt v Schumacker” (Case “Schumacker”), (1995), ECR I-225. The case concerns a Belgian resident employed in Germany. Because of his non-resident status, Mr. Schumacker was denied in Germany the “splitting regime”, an income tax regime allowing couples to benefit from a lower progression, and the procedural advantage of an overall tax assessment at the end of the year, as both advantages were only granted to German residents.

⁷⁴⁰ See Case “Schumacker”, paras 31-34 where the Court stated, that “there are objective differences between them, both from the point of view of the source of the income and from the point of view of their ability to pay tax or the possibility of taking account of their personal and family circumstances”.

⁷⁴¹ See Case “Schumacker”, para 36-38.

⁷⁴² Malherbe points out that the decision in Case “Schumacker” followed the Commissions unsuccessful attempts to harmonize the income tax systems of the MS in this respect, first through the 1979 Commission proposal for a directive concerning the harmonization of income taxation provisions with respect to freedom of movement for workers within the EU, which was withdrawn in 1993, and then through “soft law”, with the Tax Recommendation (1994), *Ibid* para 153, pp. 22-28, see Malherbe (2008), p. 16.

⁷⁴³ See Barnard (2004), p.326.

⁷⁴⁴ See Barnard (2004), p.326 with reference generally to Wouters (1994).

⁷⁴⁵ See Case “Schumacker”, para 31 et seq.

“objectively comparable situation” under the Schumacker-doctrine is given where a non-resident derives its income entirely or almost exclusively from economic activities in the Host State.⁷⁴⁷ Furthermore, following Case “Wielockx” the ECJ extended the Schumacker-doctrine with its decision in Case “Gschwind”⁷⁴⁸ to cases where a non-resident receives only such a small portion of its income in its Home State that is subject to little or no tax there⁷⁴⁹ taking opportunity to define a “significant economic activity”. Even though the ECJ did not express a threshold by number, it confirmed existence in general that shall be at a minimum of 50%⁷⁵⁰, but a threshold at 90% may not be discriminatory though.⁷⁵¹ Besides, the income must be taken into account by either the home or the Host State otherwise discrimination arises⁷⁵² as outlined in Case “Wallentin”⁷⁵³ and Case “Estonia”⁷⁵⁴.

However, the ECJ discussed the reference made in the case to the Commissions “Tax Recommendation 1994”⁷⁵⁵ limiting the equal treatment of non-residents by defining a “significant economic activity”:

⁷⁴⁶ Case C-80/94, “G.H.E.J. Wielockx v. Inspecteur der Directe Belastingen” (Case “Wielockx”), (1995), ECR-I 2493.

⁷⁴⁷ Thus, a non-resident in a “comparable” situation must be eligible for the same benefits as resident taxpayers are and not be excluded from favourable treatment though (see case “Wielockx”, para 21). Otherwise, discrimination is involved (see Case “Wielockx”, para 22). Malherbe points out, hereto, that, “interestingly, the ECJ decision of 1995 followed the Commissions unsuccessful attempts to harmonize the income tax systems of the MS in this respect, first through the 1979 Commission proposal for a directive concerning the harmonization of income taxation provisions with respect to freedom of movement for workers within the Community, which was withdrawn in 1993, and then through a “soft law”, with the Commission Recommendation 94//79/EC of 21 December 1993 (“Tax Recommendation 1994”) on the taxation of certain items of income received by non-residents in a MS other than that in which they are resident”. (See Malherbe (2008), p. 16).

⁷⁴⁸ See Case C-391/97; “Gschwind v Finanzamt Aachen-Aussenstadt” (Case “Gschwind”), (1999), ECR I-5451.

⁷⁴⁹ See hereto the “Trilogy” of cases which are Case “Gschwind”; Case C-169/03, “Florian W. Wallentin v Riksskatteverket” (Case “Wallentin”, (2004), ECR I-6443, and Case C-39/10, “Commission v Republic of Estonia”, judgement of 10 May 2012, not yet published; See Exhibit IV.5.2-1: Case law on (direct) tax – “Equal treatment”.

⁷⁵⁰ See Case “Gschwind”, para 29.

⁷⁵¹ See Case “Gschwind”, para 6, 32. This threshold was set by the German tax law in Case “Gschwind”.

⁷⁵² See Case C-169/03, “Florian W. Wallentin v Riksskatteverket” (Case “Wallentin”, (2004), ECR I-6443, para, 20, which confirmed the ruling of the ECJ in Case “Gschwind” as followed from Case “Schumacker”.

⁷⁵³ Ibid.

⁷⁵⁴ See Case “Estonia”, paras 60-65.

⁷⁵⁵ The Tax Recommendation 1994 in Art 2(1) specified: “MS do not subject the items of income specified ... in the MS of taxation, to any heavier taxation than if the taxpayer ... were resident in that MS.”

*“... subject to the condition that the items of income ... which are taxable in the MS in which the ... person is not resident constitute at least 75% of that person’s total taxable income during the tax year”.*⁷⁵⁶

Even though the ECJ did again not expressly confirm a threshold and an activity to be significant when comprising of at least 75% of the taxable income⁷⁵⁷ it may now together with the threshold of 90% subject to Case “Gschwind” serve as a valid range for the assessment of what significance any activity in a Host State as well as in a Home State shall be in order to benefit from allowances in a Host State though.⁷⁵⁸ The range of relevant income received in a Host State may be required in a range of at least 75%⁷⁵⁹ to 90%⁷⁶⁰ likely to serve for a maximum threshold. Whereas, any income in the Home State may not exceed 50% rather being smaller than representing 25% of the income received in the Home State though.⁷⁶¹

Thus, it follows from the Schumacker-principle a difference in tax treatment between residents and non-residents must not constitute a difference where the non-resident taxpayer is in a comparable situation.⁷⁶² Equal treatment, however, is required where the taxpayer receives the most substantial part of its income not in the country of residence but in the Host State. In that case the latter State cannot apply to non-residents a different tax treatment from that applied to residents.⁷⁶³ Consequently, as regards the tax treatment, the non-resident must be treated as resident in the MS in which he receives its most significant part of

⁷⁵⁶ The threshold was taken from the Tax Recommendation 1994, which in its Article 2(2) limited the equal treatment of non-residents.

⁷⁵⁷ The Commission, however, has asserted that the Recommendation given was not binding and not intended to supplement the rules of primary law on the freedom of movement. The Recommendation merely had proposed the adoption of national measures to implement EU law. But, finally, the Recommendation was adopted before the judgment in Case “Schumacker” was delivered by the ECJ, it has “in fact lost its *raison d’être*” (see Case C-39/10, “Commission v Republic of Estonia” (Case “Estonia”), (2012), ECR I-0000, para 46).

⁷⁵⁸ See Case “Estonia”, para 61.

⁷⁵⁹ See Tax Recommendation 1994, Art 2(2).

⁷⁶⁰ See Case “Gschwind”, para 6. The ECJ furthermore provided that in order to calculate the 90% fraction, the MS of activity could not take into consideration income of one of the spouses that was not considered taxable by the MS of such spouses’ residence (See Case C-329/05, “Finanzamt Dinslaken v Meindl”, (2007), ECR I-1107, where the ECJ furthermore “approved” the German threshold of 90%).

⁷⁶¹ See Case “Gschwind”, para 29 and Case “Estonia”, para 54.

⁷⁶² See Case “Gschwind”, para 26.

⁷⁶³ See Case “Schumacker”, para 30, Case “Gschwind”, para 21 as well as more recently Case C-383/05, “Raffaele Talotta v État Belge”, (2007), ECR I-2555, para 18.

the income, and that State must grant the tax advantages it allows to residents though.⁷⁶⁴ Furthermore, a non-resident must not be placed in a disadvantageous situation as the person would have not taken advantage of the freedom of movement i.e. that he would be taxed in the Host State while he would not be subject to tax in his Home State with the same income though. Any different treatment would, therefore, be "... incompatible with the requirements of the Treaties as they follow from Art. 45".⁷⁶⁵

5.3 Tax treatment of non-resident companies

According to the Treaty⁷⁶⁶ companies shall "... be treated in the same way as (resident) natural persons ...".⁷⁶⁷ In this way, the Treaty aims to assimilate the position of companies with that of individuals.⁷⁶⁸ In this context, it is the company's seat that serves as the connecting factor as it does nationality for individuals as it was seen already above⁷⁶⁹ leading to equal treatment in the field of taxation provided the two situations are comparable.⁷⁷⁰ The "principle of equal treatment" builds the basis for analysing access to tax benefits for non-resident companies. Where, however, access to the tax regime of a Host State and its benefits is subject to nationality of the company (direct)⁷⁷¹ discrimination generally starts at company law level already. Beside the general case law analysed above on the recognition of the foreign company in the following case law extant is analysed with regard to access to equal treatment in general as well as to specific benefits and burdensome or less beneficial treatment of a company in the Host State.⁷⁷²

⁷⁶⁴ See Case "Gschwind", para 27. See Exhibit IV.5.2-1.

⁷⁶⁵ See Case "Estonia", para 58.

⁷⁶⁶ Art. 49 applies not only to individuals but to companies (legal persons) too by way of primary ("... set up and manage undertakings ... companies ..." (Art. 49 II)) or secondary ("... setting up of agencies, branches or subsidiaries ..." Art. 49 I)) establishment⁷⁶⁶ provided the company complies with the conditions set out in Art. 54.

⁷⁶⁷ See Art. 54 I.

⁷⁶⁸ Barnard (2004), p. 310.

⁷⁶⁹ See Section 2.3 with sub-section 2.3.3 referring to Case "Avoir Fiscal", paras 18 and 22.

⁷⁷⁰ As outlined in Case "Schumacker", para 30. See section 2.5.3 above.

⁷⁷¹ For definition and differentiation of direct vs. indirect discrimination see Chapter III section 3.1.6 above.

⁷⁷² Taxation in the Home State is not in scope for this analysis since the cross-border situation faced by company's in the Host State are of issue and situations relevant to the Home State shall be discussed with the cases in the field of company law already to the extent relevant for the objective of this thesis (see Sec. 2).

5.3.1 Equal treatment

The situation of either a non-resident or a permanent establishment in a cross-border situation is viewed distinct by Host States since the permanent establishment itself does not constitute a legal personality by itself. Rather, it is part of the legal entity identified as the company. As such the permanent establishment constitute an activity of the non-resident company in the Host State. In this respect the permanent establishment shall be viewed in the Host State in the same way as the non-resident company that is to be treated in the same way as a domestic company under EU law. Following from the analysis⁷⁷³ above any denial of access on grounds of nationality is discriminatory. Consequently, any company formed according to the laws of a MS shall be entitled to access any other MSs tax regime and its tax benefits.

(1) Case “Stauffer”

In the context of direct taxation this situation may be subject to an analysis under Art. 63 ff. since the taxation is linked to the free movement of capital as it was the subject situation in Case “Stauffer”.⁷⁷⁴ The ECJ ruled that that the differential treatment of resident and non-resident entity⁷⁷⁵ constitutes an unjustified breach on the free movement of capital. Provided that the non-resident entity is comparable to a resident entity⁷⁷⁶ it is in a “comparable situation” with a resident entity. The ECJ held that the entity comparable in its essential criteria for the tax treatment of such type of entities under the laws of the Host State has to be equally treated in the Host State to the resident ones. Thus, the location of an entity within the EU cannot be decisive for the question of taxation. Consequently,

⁷⁷³ See Sec. 5.2 above.

⁷⁷⁴ See Case C-386/04, “Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften” (Case “Stauffer”), (2006), ECR-I-8203. Subject to Case Stauffer was an Italian resident foundation deriving rental income from German real estate in 1997, which was subject to German corporate tax. Since the German law stipulates that exemption from corporate tax only applies to resident entities, i.e. entities that have their registered office and/or governance structure in Germany, the German tax authorities refused to grant that exemption to the Stauffer foundation as well since it was not a foundation resident under German law. Hence, the same tax advantages must be provided to a permanent establishment and resident companies equally.

⁷⁷⁵ The entity in the main proceedings of this case involved a charitable foundation incorporated and established under Italian law (see Case “Stauffer”).

⁷⁷⁶ Since the referring Court had already recognised the charitable status of Stauffer, the ECJ considered Stauffer to be comparable, thus being in a “comparable situation” with a German charitable foundation (see Case “Stauffer”).

according to the Schumacker doctrine⁷⁷⁷ it decided that the non-resident entity was to be exempted from real estate tax in the Host State. Therefore, “Stauffer” was able to claim tax benefits originally designed by the German government for its domestic foundations only.

The ECJ went on later to confirm the decision taken in Case “Stauffer” when it had to decide on the eligibility of a non-resident non-profit making body to claim for a reduced rate of tax applicable to a legacy received by a resident of that MS. The situation was at issue in the main proceedings in Case “Missionswerk”.⁷⁷⁸ In this case the ECJ held that a MS is prohibited from establishing rules that take as its criterion the location of operations to benefit from (lower) domestic tax rates. Accordingly, a MS cannot refuse the non-resident the right to equal treatment.⁷⁷⁹

(2) Case “Prunus”

France provided with Case “Prunus” for another case within the context of foreign direct investment.⁷⁸⁰ According to the French GTC non-resident owners holding direct real property in France were subject to a 3% tax on the market value of the property unless the Home State of the foreign company had entered into a convention on administrative assistance to combat tax evasion with France.⁷⁸¹

Thus, resident owners of real property as well as such owner without having a permanent establishment in France and resident in a MS or country without having entered into such convention were subject to the 3% tax on the market value of their direct property holdings in France. Since the ECJ already held that cross-border investments into immovable property such as that in this case constitute a movement of capital within the meaning of Art. 63⁷⁸² it held the 3% tax rule to constitute a restriction on the free movement of capital though.⁷⁸³

⁷⁷⁷ See Case “Schumacker”.

⁷⁷⁸ See Case “Missionswerk”.

⁷⁷⁹ Ibid, para 34 (Case “Missionswerk”).

⁷⁸⁰ See Case C-384/09, “Prunus SARL, Polonium SA v Directeur des services fiscaux” (Case “Prunus”), judgement of 5 May 2011, not yet published.

⁷⁸¹ Ibid, para 23.

⁷⁸² Ibid, para 22 with reference to Case C-451/05, “Européenne et Luxembourgeoise d’investissements SA (ELISA) v Directeur général des impôts and Ministère public”, (Case “ELISA”), (2007), ECR I-8251.

⁷⁸³ Ibid, para 25.

The ECJ therefore decided that the additional condition of the existence of the said convention between the Host State and the Home State may entail, for that category of legal persons, a de facto permanent regime of non-exemption from that tax, making investment in immovable property in France less attractive for such non-resident companies.⁷⁸⁴

(3) Summary

From the case law it results that a company's activity in the Host State either through the creation of a permanent establishment or a subsidiary shall not be treated differently as a resident company under the tax laws of the Host State being the Home State of the resident company. With respect to access the tax regime and its benefits a branch of non-resident companies must be treated in the same way as the Host State would treat branches of its resident companies domestically or equally in case of a subsidiary to those of resident parent companies.⁷⁸⁵ Thus, in any case the treatment shall be related as if they were related to resident companies.⁷⁸⁶

The ruling of the ECJ in Case “Stauffer”, however, was a significant step for the income tax treatment of companies operating in other European countries.⁷⁸⁷ Furthermore, the ECJ developed in this case its case law established in the context of corporate and company law applying the freedom of establishment that has led finally in the decision in Case “Inspire Art”.⁷⁸⁸ However, in Cases “Stauffer” and “Missionswerk”, the equal treatment principle was applied especially in the context of direct tax law referring to the free movement of capital.⁷⁸⁹

⁷⁸⁴ Ibid, para 23.

⁷⁸⁵ See Malherbe (2008), p. 26.

⁷⁸⁶ Ibid, p.32.

⁷⁸⁷ This was especially true for non-profit organisations for which the judgement was originally relevant since much national legislation did not grant exemptions to foreign organisations operating on their territory. This judgement also had a favourable impact on inheritance or gift taxes on cross-border giving to charities located in other MS. The court referred to Annex I of the Council Directive 88/361/EEC, of June 24, 1988, which provides for a community definition of “capital movements”. It should be stressed that cross-border gifts or legacies are also explicitly described as capital movements in the Annex I of the abovementioned Directive. This means that legislations which restrict privileges on inheritance or gift taxes on cross-border gifts to charities located in another Member State are in conflict with article 56 of the Treaty of Rome (see King Baudouin Foundation (2012).

⁷⁸⁸ See Case “Inspire Art”.

⁷⁸⁹ See Cases “Stauffer”, para 37 and Case “Missionswerk”, para 26.

5.3.2 Prior authorisation

Access to the Host State on activities involving immovable property, like this is the case with access to MSs REIT regimes, sometime is made conditional to a prior authorisation by the Host State to apply from the taxpayer. Even though those cases do not comprise the direct tax area any type of authorisation might be a first hindrance to get access to the market of the Host State that is conditional to conduct activities, which are then subject to tax. In this respect any condition for authorisation can be seen as a mean of discrimination though.

(1) Cases “Konle”, “Albore” and “VBV”

Such kind of authorisation was subject to the decision in Case “Konle”⁷⁹⁰ and Case “Albore”.⁷⁹¹ Both of the cases involved a rule according to which any non-domestic buyer of real property in the Host State was to obtain authorisation prior to the acquisition of a property.⁷⁹² The ECJ found such a rule to creating a (direct) discriminatory restriction against foreign nationals and a violation of the free movement of capital though.⁷⁹³

Same situation, however, applies where a non-resident investment fund is to seek for prior authorisation in the Host State before legally distributing its units to residents of that Host State.⁷⁹⁴ Case “VBV” was not about the fund failure to seek authorisation but a resident pension fund that shall have violated its regulatory applicable restriction, which is to invest in authorised products only.

The ECJ held that such legislation requiring an authorisation of foreign investment funds prior to being marketed is:

⁷⁹⁰ See Case “Konle”.

⁷⁹¹ See Case “Albore”.

⁷⁹² Case “Konle” involved a Austrian rule according to which a non-domestic buyer of a plot of land located in Austria was subject to the condition to having obtained a prior authorisation for the acquisition and having to demonstrate that the planned purchase would not be used to establish a secondary residence (para 23), whereas Case “Albore” was about a similar Italian rule according to which only Italians were exempted from the requirement of obtaining authorisation before buying a property in areas designated as being of military importance (para 16).

⁷⁹³ See Case “Konle”, para 23; Case “Albore”, para 16.

⁷⁹⁴ See Case C-39/11, “VBV – Vorsorgekasse AG v Finanzmarktaufsichtsbehörde (FMA)” (Case “VBV”), (2012), judgement of 7 June 2012, not yet published.

“... likely to deter and, in fact, prevent, by reason of the financial penalty provided for, severance funds from investing their assets in the investment funds established in another MS and must therefore be classified as a restriction on the movement of capital.”⁷⁹⁵

Furthermore, the ECJ stated that such legislation has restrictive effects to foreign investment funds as they have to undergo the procedure of authorisation conditionally to sell its units⁷⁹⁶ irrespective of the fact that

“... those funds have been lawfully established and approved in the MS in which they have their seat”⁷⁹⁷

while seeking legitimately to attract capital from other MSs, which under this legislation obviously hinder cross-border movement of capital.

(2) Case “Scientologie”

Following its case law with which the ECJ often finds that systems of prior authorisation are discriminatory, thus, violating the Treaty’s freedoms⁷⁹⁸, the ECJ specified its case law and set out requirements for such authorisations possibly to be lawful though. This specification came with Case “Scientologie” where the ECJ held any requirement for authorisation to breach Art. 63 I but only where the authorisation does not meet certain requirements.⁷⁹⁹ Case “Scientologie” was about a rule of the Host State making foreign direct investment subject to prior authorisation. Here, the ECJ did not find the requirement as such discriminatory rather the rule at issue did not make a difference in the cases requiring authorisation, thus, lacked a detailed definition of the specific direct investment subject to the requirement.⁸⁰⁰ Any rule of authorisation may be lawful though where investors subject to the authorisation are given indication as to the specific circumstances in which the authorisation is required, otherwise a rule contravenes the principle of legal certainty.

⁷⁹⁵ See Case “VBV”, para 25.

⁷⁹⁶ Ibid, para 26

⁷⁹⁷ Ibid, para 27.

⁷⁹⁸ See Case “Scientologie”, para 18.

⁷⁹⁹ See Case “Scientologie”, para 22.

⁸⁰⁰ See Case “Scientologie”, para 21.

(3) Case “Belgium 2011”

The same applies in case where a national rule creates a limitation of tax benefits to the fact having paid registration duty in the MS before being eligible for such beneficial treatment. Hereto, the ECJ decided in Case “Belgium 2011” this constitutes a restriction of the free movement of capital.⁸⁰¹

(4) Summary

Furthermore, the freedom of establishment must not be blocked to assist the local community by way of setting up any type of authorisation prior the access to the market of the Host State⁸⁰² or in making an authorisation of a foreign direct investment that is conditional to conduct activities.⁸⁰³ Where, however, a REIT must be recognised in the Host State and the Host State recognises the foreign REIT but sets out such national legislation which makes the establishment of an undertaking or the conduct of an investment from another MS conditional upon the issue of prior authorisation that prerequisite for prior (additional) authorisation is capable of hindering the exercise by i.e. a undertaking of freedom of establishment, by preventing the undertaking from freely pursuing its activities through a fixed place of business.⁸⁰⁴ Thus, any requirement for prior authorisation upon entering a MS market is purely (indirect) discriminatory while creating a precondition to get access to the domestic tax regime in the Host State, thus, clearly hinders the free movement of capital.⁸⁰⁵ It is, therefore, to observe that the right to acquire, use or dispose of immovable property on the territory of another MS is the corollary of the freedom of establishment⁸⁰⁶; and capital movements include investments in such property in the territory of a MS by non-residents.⁸⁰⁷

⁸⁰¹ See Case C-250/08, “Commission v Belgium” (Case “Belgium 2011”), (2011), judgement of the Court of 1 December 2011, not yet published.

⁸⁰² See Case “Konle”.

⁸⁰³ See Case “Scientologie”.

⁸⁰⁴ See Joint Cases C-570/07 and C-571/07, “Blanco Pérez and Chao Gómez”, (2010), ECR I-04629, para 54.

⁸⁰⁵ See Case C-400/08, “Commission v Kingdom of Spain”, (2011), ECR I-01915, para 65, 72.

⁸⁰⁶ See Case “Konle”, para 22, Case C-512/03, “J. E. J. Blanckaert v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen” (Case “Blanckaert”), (2005), ECR I-7685, para 35 and more recently Advocate General Sharpston’s opinion in Case C-250/08, “Commission v Belgium”, (2011), judgement of 1 December 2011, not yet published, para 27.

⁸⁰⁷ Advocate General Sharpston’s opinion in Case C-250/08, *Ibid*, with reference to “Case C-203/80, “Criminal proceedings against Guerrino Casati” (Case “Casati”), (1981), ECR I-2595, para 8 where the ECJ stated that freedom to move certain types of capital (i.e. in order to purchase

5.3.3 Tax benefits

Any kind of benefits or tax advantages must be granted to companies irrelevant of their residence. The ECJ developed this understanding in several cases where a national measure hindered the non-resident company or its permanent establishment to benefit from domestic tax treatment applied to resident companies in comparable situations though. Benefits dealt with by the ECJ case law comprise the granting of tax credits⁸⁰⁸ in respect of foreign dividends⁸⁰⁹, the application of higher taxes (i) where a company had its seat in a MS different to the MS of taxation,⁸¹⁰ (ii) as a result of not taking trade-offs i.e. social benefits into account⁸¹¹ and (iii) in case of higher taxes applied to a branch of a non-resident company compared as the non-resident company would have established a subsidiary under German law which could have (directly) benefited from lower taxes⁸¹² as well in case (iv) of a difference in the tax rate on foreign and domestic dividends⁸¹³ or the residence of the property owner and the location of the property⁸¹⁴.

immovable property) is, in practise a pre-condition for the effective exercise of other freedoms guaranteed by the Treaty, in particular the right of establishment.”, see footnote 25.

⁸⁰⁸ See Case “Avoir fiscal”, para 18.

⁸⁰⁹ See Case C-319/02, “Petri Manninen” (Case “Manninen”), (2004), ECR I-7215 where in Finland, the shareholder of a Finish company was granted a tax credit, corresponding to the Finish corporation tax rate to avoid double taxation on dividends received from domestic companies and did not apply in respect to foreign dividends and Case C-292/04, “Meilicke, Weyde, Stöffler v Finanzamt Bonn-Innenstadt” (Case “Meilicke”), (2007), ECR I-1835 in respect of a German tax credit granted to shareholders of domestic corporations, corresponding to the (lower) corporation tax rate on distributed profits (30%).

⁸¹⁰ See Case “RBS” where the Court ruled a provision under an MS’ tax regime to be in breach of Art. 49 where company profits are taxed at higher rates if its seat is in another MS (Home State) than if its seat were in the MS of taxation (Host State). In this case national law of Greece taxed profits earned by non-resident companies at a higher rate compared to the rate on profits earned by a resident company (see Case “RBS”, paras 27-29). This was a direct application of the Schumacker doctrine established in Case “Schumacker”⁸¹⁰ relating to the taxation of income of individuals to the corporate area (see Case “Schumacker” and Case “Wielockx”).

⁸¹¹ Asscher was a Dutch national who worked in Belgium while residing in the Netherlands and the moved to Belgium. Although he worked as a self-employed person in both States, he was treated as a non-resident in the Netherlands and taxed at a higher rate than residents (see Case “Asscher”, para 49).

⁸¹² See Case C-253/03, “CLT-UFA v Finanzamt Köln-West”, (2006), ECR I-1831.

⁸¹³ See Case C-315/02, “Lenz v Finanzlandesdirektion für Tirol” (Case “Lenz”), (2004), ECR I-763. The case concerned Austrian legislation, which provided that dividends from domestic corporations were taxed at a reduced rate while dividends from foreign shares were taxed at the ordinary rate of income tax.

⁸¹⁴ See Case C-443/06, “Erika Waltraud Ilse Hollmann v Fazenda Publica” (Case “Hollmann”), (2007), ECR I-8491.

Further cases of the violation of the freedom of capital are found, where a DTT does not apply irrelevant of residence of the taxpayer⁸¹⁵, procedural rules limit the repayment of overpaid tax to companies with “fiscal residence” only⁸¹⁶, a company in a Host State is subject to tax payments upfront, thus creating a cash-flow advantages to domestic companies⁸¹⁷ and the deduction of cost and/or expenses is limited if possible at all.⁸¹⁸

5.3.4 Withholding tax

The taxation of outbound dividends is likely to create the risk of double taxation since the Host State regime may impose withholding tax on dividends paid to its foreign shareholder.⁸¹⁹ The risk of dividends to be double taxed is not always mitigated through DTTs extant between Home State and Host State that a discrimination and, thus, breach of EU law can be identified.⁸²⁰

With Case “Aberdeen Alpha”⁸²¹ the ECJ provided another ruling out in a series of rulings about a fundamental change in the taxation of company profits and dividend distributions. The ECJ ruled the levy of a withholding tax on dividends

⁸¹⁵ See Case “Saint-Gobain”.

⁸¹⁶ The tax provision in question was liable to work “more particularly to the disadvantage” of those companies having their seat in another MS (Home State), see Case “Commerzbank”, para 15.

⁸¹⁷ See joined Cases C-397 & 410/98, “Metallgesellschaft Ltd and Hoechst v. Commissioners of Inland Revenue” (Case “Metallgesellschaft”), (2001), ECR I-1727, para 87.

⁸¹⁸ See for “deduction of interest”: Case C-324/00, “Lankhorst-Hohorst v Finanzamt Steinfurt” (Case “Lankhorst”), (2002), ECR I-11779. Case “Lankhorst” was on thin capitalisation rules where the deduction of interest paid on the loan provided by the parent company as a substitute for equity was treated as dividend payment and thus subject to withholding tax in Germany; “deduction for cost of foreign shareholding”: Case C-168/01, “Bosal Holding v Staatssecretarinen van Financien” (Case “Bosal”), (2003), ECR I-9401 (Under Dutch legislation interest and cost linked to participations could be deducted only if they were incurred in connection with profits taxable in the Netherlands (Art. 13(1) Dutch Law on Corporation tax 1969)) and Case C-471/04, “Keller Holding” (Case “Keller”), (2006), ECR I-2107 (German law denied the deduction of expenditure linked to dividends received from a subsidiary located abroad and exempt tax under a DTT (See Sec. 8b (1) German Corporation Tax Law 1991) and “Keller” was barred from deduction the fraction of its financing costs corresponding to its Austrian subsidiary (See Sec. 36(2) (3) German Income Tax Law 1990)); “deduction of rental income losses”: Case C-152/03, “Ritter-Coulais v Finanzamt Gernersheim” (Case “Ritter-Coulais”), (2006), ECR I-1711, para 44, and Case C-182/06, “Luxembourg v Lakebrink” (Case “Lakebrink”), (2007), ECR I-6705, para 26; “deduction of debts”: Case C-364/01, “Heirs of Barbier v Inspecteur van de Belastingdienst” (Case “Heirs of Barbier”), (2003), ECR I-15013, and on the “deduction of business expenses”: Case “Gerritse”.

⁸¹⁹ Traditionally, the State of the company paying the dividend will impose a withholding tax. The withholding tax is sometimes waived in favour of domestic shareholders, especially parent companies or reduced in case of a DTT. Where a DTT is established along the lines of the OECD-Model convention the DTT shall provide for a reduction of the withholding tax from 25% to 15% or even 5% to 0% in favour of parent companies.

⁸²⁰ See Malherbe (2008), p. 46.

⁸²¹ See Case C-303/07, “Proceedings brought by Aberdeen Property Fininvest Alpha Oy” (Case “Aberdeen Alpha”), (2009), ECR I-5145.

distributed from a Finish company to a Luxembourg tax exempt SICAV a discrimination of the foreign shareholder since if the dividend would have been made to a domestic shareholder the payment would have not been subject to any withholding tax.⁸²²

What made the decision in Case “Aberdeen Alpha” special was the clear statement of the ECJ that the involvement of a foreign entity, which may or may not be extant in the MS applying withholding tax does not constitute a situation that is not comparable in the meaning of the Schumacker-Doctrine. The ECJ made clear that whatever the differences between domestic and foreign taxpayers are it does not render the foreign entity incomparable to a domestic company. Simply the existence of a special tax regime and different corporate characteristics do not *per se* exclude comparability.⁸²³ Therefore, the application of withholding tax on the distribution to the non-resident company was held to constitute discrimination between domestic and foreign shareholders, thus a barrier to cross-border investment within the EU, thus, a breach of EU law.⁸²⁴

In Case “Commission v Germany”⁸²⁵ the ECJ was about to take decision about the tax treatment of dividend payments. The subject issue in the main proceedings was about resident shareholders, which benefit from the setting off of withholding tax against domestic corporation tax whereas, for non-resident companies established in another MS, the withholding tax had a discharging effect, while those companies were subject to a greater tax burden on dividends.⁸²⁶ Though, the ECJ concluded in this case that the different treatment of dividends distributed depending on the residency of the company is liable to deter companies established in other MS (Home State) from making investments in the Host State.

⁸²² The case was about a Finish company, Aberdeen Property Fininvest Alpha Oy, which distributed a dividend to its sole shareholder, Aberdeen Property Nordic Fund I SICAV, a tax exempt investment fund in Luxembourg. Had the shareholder been a Finish company, the dividend would have been paid free of withholding tax, but foreign shareholders are subject to a withholding tax (see Case “Aberdeen Alpha”, para 39).

⁸²³ See Case “Aberdeen Alpha”, para 55.

⁸²⁴ Ibid, para 56.

⁸²⁵ Case C-284/09, “European Commission v Federal Republic of Germany” (Case “Commission v Germany”), (2011), ECR I-09879.

⁸²⁶ See Case “Commission v Germany”, para 21. This holds true for situations of dividend payments to companies established in another MS, where the parent company’s holding in the capital of the subsidiary does not reach the threshold provided for in Art. 3(1)(a) of the “Parent-Subsidiary Directive”, para 50.

Furthermore the ECJ found that it also "... constitutes an obstacle to the raising of capital by resident companies from companies established in other MS ...".⁸²⁷ Because resident corporate shareholders receive a tax credit or tax rebate in the amount of the withholding tax paid but did not apply retrospectively to non-resident corporate shareholders the respective German tax rule⁸²⁸ constitute a restriction of the free movement of capital.⁸²⁹

Furthermore, the ECJ made clear that there shall be no difference as to the taxation of shareholders based on company residence. In Case "Verkoijen"⁸³⁰ a rule exempting dividends from tax received from a domestic company only was found to be contrary to the free movement of capital.

The landmark judgment in Case "Santander"⁸³¹ had major impact on dividend withholding taxes in MSs.⁸³² The ECJ ruled that the difference in treatment between resident and non-resident investment funds discourages non-residents from investing in companies established in France and, vice-versa, French investors from acquiring shares in non-resident companies.⁸³³ This situation constitutes a restriction of the free movement of capital under Art 63 in circumstances where the funds are comparable and there is no justification for the different treatment of non-resident investment funds. In respect of comparability, the ECJ stated that the French rule is based on the residence of the funds and, thus, the comparability is to be assessed solely at the fund level.⁸³⁴

⁸²⁷ See Case "Commission v Germany", para 72,

⁸²⁸ See German Law on Income Tax Paragraph 20(1)(1), 43a(1)(1) and 36(2)(2) EStG.

⁸²⁹ Ibid, para 73.

⁸³⁰ See Case "Verkoijen" where a Dutch rule introduced a distinction in the tax treatment of resident shareholders as concerns the State of residence of the company in which its shareholders have their holding. Under this rule an exemption of tax was only available for dividends received from a domestic company.

⁸³¹ See joint Cases "Santander".

⁸³² In Case "Santander" Spanish, German, Belgian UCITS funds and US regulated investment funds argued that the levy of 25% withholding tax on French source dividends is in breach of the free movement of capital under EU law, as such French dividends received by comparable French funds are fully exempt from French tax. The ECJ ruled that certain non-French mutual investment funds were entitled to a full refund of the French dividend withholding tax on their French source portfolio dividends.

⁸³³ See Case "Santander", para 17/18. Companies in the main proceedings at issue have been UCITS (undertakings for collective investments in transferable securities (see para 2).

⁸³⁴ See Case "Santander". The arguments presented by the French government relating to the balanced allocation of taxing right and far reaching budgetary consequences were set aside by the ECJ. The judgment by the ECJ further strengthened the position of foreign investors to claim a refund of withholding taxes suffered in MSs. The opportunity exists not only for investment funds

5.3.5 Capital gains

Furthermore, the ECJ held provisions in MSs tax regimes contrary to the free movement of capital where the sale of a shareholding was exempt from domestic capital gains tax in cases the sale was effected to a domestic company whilst being taxed when sold to a foreign company as this was the situation in Case “De Beack”⁸³⁵.

Same situation applies to the cases where capital gains are taxed at the situation of the transfer of residence into another country. According to the decision in Case “Lasteyrie”⁸³⁶ the taxation of unrealised capital gains at the time of transfer of the residence i.e. of the company that taxation is contrary to Art. 49. The ECJ explicitly stated that there is no difference whether such exit tax is due at the time of the transfer fix or deferred since it is of issue only that the taxpayer wouldn’t have been subject to such exit tax in case he’d not transferred its residence though.⁸³⁷

Furthermore, the hindrance of the free movement or likewise the freedom of establishment must not be evoked by granting tax incentives i.e. on capital gains at the reinvestment of sales proceeds for the acquisition of immovable property in the MS granting the incentive in an attempt to promote the domestic housing market. This was the case for Portugal⁸³⁸ and Sweden⁸³⁹ where the ECJ held that the MS could not subject a deferral of capital gains tax arising from the sale of a property to the condition that the reinvestment in real property is made on the territory of that MS, thus excluding investments in other MSs.

within the EU or third countries, but also for companies and other investors irrespective of their jurisdiction. The ECJ judgment supports the position of foreign investors in claiming a refund of dividend withholding taxes paid in cases where a domestic investor in a comparable situation would have benefited from a tax relief.

⁸³⁵ See Case C-268/03, “De Beack v Belgische Staat (Order)” (Case “De Beack”), (2004), ECR I-5961 where the ECJ found Belgian rule contrary to the free movement of capital under which capital gains were taxed when they were realised by individuals selling a substantial holding to a foreign company, whilst they were not taxed when selling to a Belgian company (Art. 67 (8) of the Belgian Income Tax Code 1964, now Art. 90 (9) of the Income Tax Code 1992).

⁸³⁶ See Case “Lasteyrie” where a French law held to be contrary to Art 49 under which unrealised capital gains on important shareholdings were taxable at the time of transfer of the taxpayer’s residence.

⁸³⁷ See Case “Lasteyrie”.

⁸³⁸ See Case C-345/05, “Commission v Portugal” (Case “Portugal”), (2006), ECR I-10633.

⁸³⁹ See Case C-104/06, “Commission v Sweden” (Case “Sweden”), (2007), ECR I-671.

5.3.6 Summary

The principal of equal treatment require MSs to treat non-residents not different compared to residents, hence, must provide access to tax benefits under its domestic regime as for resident ones. Case law shows, however, that there is a widely used practice by MSs to treat foreign companies and shareholders in domestic companies different to resident ones.⁸⁴⁰ Here, discriminatory rules are found in MSs regimes where the foreign company or foreign shareholder is directly burdened with the levy of higher taxes on its profits, dividends received or capital gains, whereas payments and gains to resident shareholders are not subject to tax or in cases where the deduction of cost involved with the holding of real property or shares is not permitted for the non-resident. Consequently, the ECJ held the question of time when the capital gains are realised irrelevant for this assessment as held in Case “Lasteyrie”.⁸⁴¹

Furthermore, different treatment may be lawfully only where compensation is provided by granting of tax credits for the foreign tax paid or under a DTT. Where however, no such compensation provided not only discriminatory treatment might be at issue, but economic double taxation is involved too. However, the pure fact that there may be other advantages under a DTT is extant cannot lead to the result of the assessment of a national rule not to be an unfavourable tax treatment contrary to a fundamental freedom.⁸⁴² Thus, the economic outcome of the taxation in the Host State and its implications for the taxation in the Home State must be focused for assessing discriminatory rules.⁸⁴³ Thus, there must not be a different treatment under national legislation as to domestic or foreign sourced dividends that would make shareholdings in a Host State less favourable versus those in the Home State.⁸⁴⁴ Wirth reference to the decisions in Cases “Portugal” and “Sweden”

⁸⁴⁰ See Exhibit IV.5.3: Case law on (direct) tax – Access to tax of non-resident companies (overview).

⁸⁴¹ See Case “Lasteyrie”.

⁸⁴² See Case “Commission v Belgium”, para 53.

⁸⁴³ See Case “Amurta” where the ECJ held that a MS cannot deny a foreign company to benefit from tax benefits granted under a DTT even though the Shareholder may not be resident of the contracting parties to the DTT. As regards the application of either of the freedoms in question the purpose of the national legislation concerned must be taken into consideration (see Case “Test Claimants II”, para 89ff. with further references).

⁸⁴⁴ However, even though the Home State situation is not in scope of this thesis, it shall not be missed that the same situation in the Home State must not be discriminatory to resident companies

the ECJ extended its case law set to situations where there shall not be a direct discrimination rather another "...covert form of discrimination which ... lead in fact to the same result...".⁸⁴⁵ A national rule that limits the eligibility of a tax incentive to persons, which are residents of that MS "... has a deterrent effect ..."⁸⁴⁶ and is "... liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty ...".⁸⁴⁷

It is obvious from the above and confirmed i.e. in Case "Stauffer" all treatment in the Host State denying a foreign REIT's qualification for treatment under the Host State REIT regime is in breach of EU law. In this situation any taxation of the foreign REIT is *prima facie* in breach as well. However, such situation arises where a MS REIT regime grants a deferral of taxation of capital gains to the extend the gain is reinvested in domestic immovable property, thus excluding real property investments in other MSs.⁸⁴⁸ Hence, these situations create a "double" discrimination to foreign REITs with their non-recognition to qualify for domestic REIT status and the ignorance of their operating activities in MSs other than those in the Host State.

5.4 Equal treatment in direct taxation (?)

The question of this analysis whether there is equal treatment in direct taxation is two folded. First, it is to state that the case law analysed provide for numerous situations under MSs tax regimes for discrimination of non-residents.⁸⁴⁹ Discrimination in this context is neither limited to foreign nationals that provide for

though. In treating resident companies less favourable to non-resident companies with no permanent establishment in Belgium "... is liable to deter companies established in other MS from making investments in Belgium ...", ⁸⁴⁴ thus constitutes an obstacle to the freedom of establishment⁸⁴⁴ as well as to the freedom of movement of capital (see Case C-387/11, "European Commission v Kingdom of Belgium" (Case "Commission v Belgium"), Judgement of 25 October 2012, OJ C 305 from 15.10.2011, p.4).

⁸⁴⁵ See Case "Greece", para 45 with reference to Case "Commerzbank", para 14. In this case Greece law on transfer tax provided for the exemption from the tax on the transfer of immovable property solely to persons permanently resident in Greece prior to the purchase and not to non-residents who intended to settle in Greece after the acquisition of the property. Additionally, that grant was limited solely to Greek nationals on the purchase of a first home in Greece, expressly discriminating against persons resident abroad who are not Greek nationals.

⁸⁴⁶ Ibid, para 49.

⁸⁴⁷ Ibid, para 51.

⁸⁴⁸ See Cases C-345/05, "Commission v Portugal", (2006, ECR I-10633 and C-104/06, "Commission v Sweden", (2007), ECR I-671.

⁸⁴⁹ See Exhibit IV.5.3: Case law on (direct) tax – Access to tax of non-resident companies.

an (additional)⁸⁵⁰ establishment (residency) in the Home State or to shareholders with holdings in real property or real estate companies, nor to companies operating cross-border from time to time only without setting up a subsidiary in another MS (Host State).

From the case law analysed it is to conclude that extant MSs direct tax regimes often does not comply with EU law in full, rather treating non-residents different to its residents even though being in a comparable situation. Such non-equal treatment of residents and non-residents results in the discrimination on grounds of nationality. Herewith, MSs direct tax regimes are in violation of the freedoms of movement of capital and the freedom of establishment. The transfer of these findings to MSs REIT regimes shall assist the identification of suspect criteria, thus, potential “misfit” of MSs REIT regimes. However, this analysis is subject to Section 7 below since question is to answer as to whether the findings made above can be justified on grounds of the Treaty though. Therefore, this discussion is done in the following section first.

6. Justification or Justi-fiction?

As the ECJ case law emerged finding MSs tax rules in violation to the freedoms and MSs REIT regimes are suspect of non-compliance with EU law, question remains as to whether MSs may rely on possible means for justification of its national rules though. The Treaty provide for grounds of justification with a view to national measures i.e. with Art. 36, 45 III and 52 I, especially with a view to “measures ...on grounds of public policy, public security or public health.” At least, since the Maastricht revision the Treaty includes rules for justification to those having tax relevance i.e. 65, I lit. a) and b). However, that ECJ provided for “imperative reasons” in the public interest that are not provided for in the Treaty though.

Established case law, therefore, provides that the measures prohibited by Art. 63 as restrictions on the movement of capital, include those which are such as to

⁸⁵⁰ Since the thesis focused limited to cross-border situations of companies in a Host State the “establishment” in the Host State is “additional” to the residence of the company in the Home State though.

discourage non-residents from making investments in a MS or to discourage that MSs residents from doing so in other MSs.⁸⁵¹ Thus, according to the ECJ overt discrimination may be justified either by those grounds set out explicitly in the Treaty whereas a restrictive measure is permissible

*“... only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest ... and must not go beyond what is necessary to attain the objective pursued”.*⁸⁵²

6.1 Justification

Beside the acceptance of general reasons for justification the ECJ further developed its principles developed with Case “Cassis de Dijon”.⁸⁵³ According to the ECJ’s case law any restriction of the freedoms may only be permissible, thus justified by overriding reasons in the “public interest”⁸⁵⁴ under the “principle of territoriality”.⁸⁵⁵ That is more particular, however, where measures aiming to safeguard (i) fiscal supervision,⁸⁵⁶ to prevent and fight against tax fraud⁸⁵⁷ or tax avoidance⁸⁵⁸ and where is need to maintain fiscal cohesion.⁸⁵⁹ Furthermore, possible reasons for justification are (ii) the coherence of the tax system⁸⁶⁰ as well as (iii) a balanced authority for taxation between MSs.⁸⁶¹

6.1.1 Fiscal supervision

The ECJ has held that the need to guarantee the effectiveness of fiscal supervision could, in general, justify a restriction on the fundamental freedoms⁸⁶²

⁸⁵¹ See Case C-370/05, “Criminal proceedings against Uwe Kay Festersen”, (2007), ECR I-1129, para 24; Case C-101/05 “Skatteverket v A”, (2007), ECR I-11531, para 40 and joined Case “Haribo”, para 50.

⁸⁵² See i.e. Case “Lasteyrie”, para 49; Case “Greece”, para 51.

⁸⁵³ See Schwarze (2007), Recital 156.

⁸⁵⁴ See Case C-442/02, “Caixa-Bank France v Ministère de l’Économie, des Finances et de l’Industrie” (Case “Caixa Bank”), (2004), ECR I-08961, para 17 and recently Case “Commission v Belgium”, paras 89-92.

⁸⁵⁵ Case “Hungary”.

⁸⁵⁶ See i.e. Case C-254/97, “Futura Participations SA and Singer v Administration des Contributions”, (1999), ECR I-4811, para 31.

⁸⁵⁷ See Case “Konle” and later Case C-213/04, “Burtscher v. Stauderer”, (2005), ECR I-10309.

⁸⁵⁸ See Case “Aberdeen”, para 58.

⁸⁵⁹ See Case C-204/90, “Bachmann v Belgium State” (Case “Bachmann”), (1992), ECR I-249;

⁸⁶⁰ See i.e. Case “Bachmann”, para 21; Case “Manninen”, para 42.

⁸⁶¹ See Case “Marks & Spencer”, Case “Belgium 2011”, paras 80-88.

⁸⁶² See Case C-155/08 “X and E. H. A. Passenheim-van Schoot (C-157/08) v Staatssecretaris van Financiën” (Case “Passenheim”), (2009), ECR I-05093, para 45.

and, thus, constitutes an overriding reason in the public interest.⁸⁶³ However, established case law requires for the justification of a measure for the prevention of tax evasion and avoidance that the legislation in question specifically targets wholly artificial arrangements designed to circumvent the tax laws.⁸⁶⁴ Wholly artificial arrangement in this respect shall be seen only where the activity does not reflect economic reality with a view to escaping the tax normality due on the profits generated by activities carried out on national territory.⁸⁶⁵

Thus, the case law precludes any general presumption of tax evasion and cannot justify as such a fiscal measure, which comprises the objectives of the Treaty.⁸⁶⁶ Moreover, the ECJ pointed out clearly on the basis of the single market concept that so long a taxpayer pays tax in any MS this is sufficient to overcome any argument of fiscal cohesion and tax avoidance that is to say in this kind of situation there is no adversely affect or undermined situation.⁸⁶⁷ With respect to cross-border situations the ECJ went on in Case “Santander” to indicate that

“... the effectiveness of fiscal supervision cannot justify taxation which affects solely and specifically non-residents.”⁸⁶⁸

This statement goes back to settled case law⁸⁶⁹ with which the ECJ has developed the so-called “Barriers”-Doctrine as a further way of circumventing the

⁸⁶³ See Case C-233/09, “Gerhard Dijkman and Maria Dijkman-Lavaleije v Belgische Staat”, (2010), ECR I-06649, para 58.

⁸⁶⁴ See i.e. Case C-264/96, Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes) (Case “ICI”), (1998), ECR I-4695, para 26; Case “Marks & Spencer”, para 57; Case “Cadbury-Schweppes”, para 51; Case “Test Claimants”, para 72 and Case “Aberdeen”, para 63.

⁸⁶⁵ See Case “Cadbury-Schweppes”, para 55 and Case “Test Claimants”, para 74 and Case “Aberdeen”, para 64.

⁸⁶⁶ See Case C-72/09, “Établissements Rimbaud SA v Directeur général des impôts and Directeur des services fiscaux d'Aix-en-Provence”, (2010), ECR I-10659, para 34 and cited case law.

⁸⁶⁷ See Case “Avoir Fiscal”, para 24; Case “Lankhorst”, para 24 (In effect sec. 8a CIT was in breach of Art. 49 (Art. 43 at the time) as an obstacle to the freedom of establishment.); Case C-152/03, “Hans-Jürgen Ritter-Coulais and Monique Ritter-Coulais v Finanzamt Germersheim” (Case “Ritter Coulais”), (2006), ECR I-01711, para 100.

⁸⁶⁸ See Case “Santander”, para 49; Case “Belgium 2011”, para 81. The fiscal cohesion argument was rejected as well in the case “Ritter-Coulais” where the ECJ found the German rule of cross-border relief taxation (see Sec. 2a I ITA.) in breach of Art. 48 while not accepting losses by a taxpayer subject to unlimited tax liability in Germany. This even though, where the taxpayer had realised those losses in another MS where the taxpayer is not subject to any tax liability in this respect and, therefore, is not able to apply for tax credit (see Case “Ritter-Coulais”, para 100).

⁸⁶⁹ See i.e. Case “Ritter-Coulais”, para 100; Case “Schumacker”, paras 36-38; Case “Verkoijen”, para 41.

tax principle that residents and non-residents are not generally in a comparable position. Where national legislation makes cross-border transactions less attractive than purely domestic business, that rule is a barrier to cross-border trade within the sphere of the single market and, therefore, *prima facie* a breach of the Treaty.⁸⁷⁰

Even the argument based on insufficient effectiveness of the instrument of cooperation⁸⁷¹ was rejected by the ECJ in Case “Belgium 2013” stating that

“... even on the assumption that ... national legislation ... is appropriate for ensuring the attainment of the objective of ensuring the effectiveness of fiscal supervision and, in particular, the prevention of tax avoidance and evasion, ... that legislation goes beyond what is necessary to attain the objective pursued.”⁸⁷²

6.1.2 Coherence of the tax system

The ECJ has acknowledged several times that the need to preserve the coherence of tax system of a MS may justify rules that are liable to restrict the exercise of the fundamental freedoms guaranteed by the Treaty.⁸⁷³ However, for an argument based on the justification for the coherence of the tax system the ECJ requires a direct link between the tax advantage concerned and the offsetting

⁸⁷⁰ See Persoff (2004). This Doctrine was the basis of the taxpayer's argumentation in Case “Marks and Spencer” as well. The ECJ has to decide whether the restriction under UK taxation of “Group relief”⁸⁷⁰ to domestic subsidiaries is lawful or the UK must have to extend his relief to foreign subsidiaries of a UK company as well (see Case “Marks & Spencer”). The legal basis for group relief under UK tax regulation is outlined in Sections 402 (3A) and (3B), 403 Income and Corporations Taxes Act 1988.

⁸⁷¹ See i.e. Case “Passenheim”, para 45.

⁸⁷² See Case “Belgium 2013”, para 63. Thus, difficulties in cooperation may not justify a restriction of the freedoms rather, the MS shall request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes concerned (See Case “ELISA”, para 95) i.e. by making use of Directive 2003/48 on the exchange of information on foreign savings accounts (See Case “Belgium 2013”, para 58 and “Taxation of Savings Income Directive”). Herewith, the ECJ further developed its “Dassonville-Formula” which already required the rule in question of being “reasonable” in order for MSs to justify its laws. Since the decision in 1974 the case law i.e. with Case “Belgium 2013” now clearly specifies the conditions and criteria for a “reasonable” restriction that may be justified though.

⁸⁷³ See Case “Bachmann”, para 28; Case C-300/90, “European Commission v Kingdom of Belgium”, (1992), ECR I-305, para 21; Case C-471/04, “Finanzamt Offenbach am Main-Land v Keller Holding GmbH”, (Case “Keller”), (2006), ECR I-2107, para 40; Case “Amurta”, para 46; Case “Belgium 2011”, para 70 and Case “Commission v Germany”, para 85; Case “Aberdeen”, para 71 and Case “Santander”, para 50.

of that advantage by a particular tax levy⁸⁷⁴ with the direct nature of that link failing to be examined in the light of the objective pursued by the rule in question.⁸⁷⁵ However, in its recent decisions the ECJ on cross-border activities by the taxpayers that direct link has been denied though.⁸⁷⁶

Different and rare example was given, however, by the ECJ with Case “Belgium 2011”.⁸⁷⁷ The ECJ found the two situations under Belgium legislation directly linked since the tax advantage concerned and the offsetting of that concession by the particular tax levy is because the same taxpayer and the same taxation is concerned.⁸⁷⁸ Furthermore, the ECJ confirmed the proportionality of the rule and the restriction appropriate to achieve the objective to safeguard for the cohesion of the tax system by operating in a symmetrical manner⁸⁷⁹.

While the amount to be possibly set off was limited to a maximum amount the ECJ found the legislation proportionate because “... the system retained its character as a tax advantage and is not in the nature of a disguised exemption.”⁸⁸⁰

6.1.3 Balanced authority for taxation between MSs

The ECJ has, furthermore, developed and accepted justification of in general restrictive measures where the system in question is designed to prevent conduct

⁸⁷⁴ Case “ICI”, para 29, Case “Verkoijen”, para 57; Case “Bosal”, para 29; Case “Manninen”, para 42, Case “Keller”, para 40, Case “Belgium 2011”, Opinion of Advocate General Sharpston, delivered on 21 July 2011, para 80 and Case “Belgium 2011”, para 71.

⁸⁷⁵ See Case “Manninen”, para 43 and “Aberdeen”, para 70.

⁸⁷⁶ See i.e. Case “Aberdeen”, para 73 (regarding a difference in tax treatment of dividends between parent companies based on the place where they have their seat); Case “Commission v Germany”, para 92 (no direct link between the withholding taxation of dividends to residents or non-residents (see O’Shea (2012), p249)); and Case “Santander”, para 52 (missing link for withholding taxation).

⁸⁷⁷ Case “Belgium 2011”, Opinion of Advocate General Sharpston, delivered on 21 July 2011, para 81. The case was about Belgian legislation providing for levying of registration duty (or an equivalent tax) on the acquisition of one principal residence and a reduction of the amount levied on the acquisition of a subsequent principal residence to replace the first (where both properties are situated in the same MS that was Belgium).

⁸⁷⁸ See Case “Belgium 2011”, para 76. One might argue that these two situations are directly linked and as Advocate Sharpston advocated at least in the mind of the purchaser but found the situations actually “... quite independent of each other as taxable events” (see para 81) since there is no offset possible once a certain period has elapsed between the sale of the preceding property and the purchase of the subsequent property otherwise it would not disappear in that way (see para 87).

⁸⁷⁹ Ibid, para 80. While the amount to be possibly set off was limited to a maximum amount the ECJ found the legislation proportionate because “... the system retained its character as a tax advantage and is not in the nature of a disguised exemption.” (see para 81).

⁸⁸⁰ Ibid, para 81.

capable of jeopardising the right of a MS to exercise its powers of taxation in relation to activities carried out in its territory.⁸⁸¹

In its settled case law the ECJ found for such situations that, where a MS has chosen not to tax resident companies in receipt of nationally-sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between MSs of the power to tax in order to justify the taxation of non-resident companies in receipt of such income.⁸⁸²

A reduction of the national tax revenue may be seen in such cases only, where the exemption from withholding tax or the grant of a tax advantage corresponds to the withholding tax deducted by the MS. However, the ECJ does not accept a reduction in tax revenue to be regarded as an overriding reason in the public interest to justify a restriction of a fundamental freedom.⁸⁸³

6.2 “Justi-fiction”?

Generally, each form or type of discrimination may be subject to justification by overriding reasons in the public interest. As already outlined⁸⁸⁴, the ECJ understands the freedoms as a means to prevent discrimination. Condition for application of the freedoms is, therefore, that the activity at issue provides some link of a cross-border character. This cross-border link may be given where the situation at issue is of inbound or outbound relevance.⁸⁸⁵ However, the opportunity for being successful is limited. With regard to its case law the ECJ is reluctant to accept the arguments that have been brought forward by MSs so far. Measures of “discriminatory” effect, though, have not been accepted as “proportional”.⁸⁸⁶ Even though, direct taxes have not been harmonised still, the freedoms have unlimited priority without direct taxes being harmonised. Rather, as outlined, although direct

⁸⁸¹ See Case “Cassis de Dijon”, para 42; Case “Amurta”, para 58; Case “Aberdeen”, para 66, Case “Commissione v Germany”, para 77; Case “Santander”, para 47 and Case “Belgium 2012”, para 75.

⁸⁸² See Case “Amurta”, para 59; Case “Aberdeen”, para 67, Case “Commission v Germany”, para 78; Case “Santander”, para 48 and Case “Belgium 2012”, para 76.

⁸⁸³ See settled case law i.e. Case “Manninen”, para 49 and cited case law as confirmed with Case “Commission v Germany”, para 83 though.

⁸⁸⁴ See Sec. 3 above.

⁸⁸⁵ See Rödder (2004), p 1630.

⁸⁸⁶ See Cordewener (2002), p. 926.

taxation falls within the sole competence of the MS they must, nonetheless exercise that competence in accordance with the Treaty's principles.⁸⁸⁷

The ECJ rarely accepted justification on the basis of the prevention of tax evasion and avoidance in limited cases since it does not accept any presumption for activities being of tax avoidance nature or leading to a tax evasion.⁸⁸⁸ This view is in line with the decision in Case "Avoir-fiscal" of 1986 still where the ECJ has pointed out that so long a taxpayer pays tax in any MS this is sufficient to overcome any argument of fiscal cohesion / tax avoidance that is to say that in this kind of situation there is no adversely affect or undermined situation.⁸⁸⁹

Furthermore, even though "overriding reasons in the public interest" have been accepted for justification in general, such measures must be "proportional" and do not go "beyond what is necessary". Generally, the ECJ found means with less restrictive effect to safeguard for the public interest,⁸⁹⁰ which is given i.e. with the Directive on administrative cooperation though.⁸⁹¹ The ECJ did neither accepted "justifications" for measures by MSs, which was based on grounds of loss of tax revenue, nor those argumentations based on the lack of harmonisation of direct taxes within the EU.⁸⁹² Additionally, the allocations of the right to tax from a MS to another MS provide now valid ground for the limitation of the freedoms though. Thus, a MS by taxing a cross-border situation is not allowed to treat the non-resident disadvantageous only because the DTT may not provide for a carve-out of such parts of the profit from cross-border activities.⁸⁹³

⁸⁸⁷ See Chapter V, Sec. 2.3.3 above with reference to Case "Avoir fiscal", para 107.

⁸⁸⁸ See Sec. (6.1) above and i.e. Case "Lasteyrie" as well as recently Case "Aberdeen", para 63.

⁸⁸⁹ See Case "Avoir fiscal", para 24. In effect Sec. 8 CIT was in breach of Art. 49 as being an obstacle to the freedom of establishment (see para 32) with reference to Case "Eurowings", para 42.

⁸⁹⁰ See Sec. (6.1) above and i.e. Case "Belgium 2013", para 63.

⁸⁹¹ See "AEOID". This Directive is based on a proposal presented by the European Commission on 2 February 2009 to replace Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of Member States in the field of direct taxation and taxation of insurance premiums. The previous Directive on mutual assistance – 77/799/EEC was repealed and a new Directive introduced. On 12th June, 2013 the Commission proposed extending the automatic exchange of information between EU tax administrations, as part of the intensified fight against tax evasion (see proposal COM/2013/348) (see Chapter VII, Sec. 4.7 below). Thus, same result may be seen under the Directive 2010/24/EC, "Mutual Assistance Directive on taxes", concerning mutual assistance.

⁸⁹² See i.e. Case "Wielockx" and Case "Lasteyrie".

⁸⁹³ See Case "X and Y".

Analysing the ECJ case law as to the assessment of arguments for the justification of measures by MSs it becomes visible that the ECJ is trying to identify for internal inconsistencies within MSs tax regimes and to invalidate arguments for defence by making reference for the MSs to comparable situations where they have already established a lawful situation in accordance with EU law.⁸⁹⁴

7. Suspect elements in MSs REIT regimes

Taking the level playing field provided by EU law of primary and secondary source suspect regulations in MSs REIT regimes can be discovered. Having elaborated the extant REIT regimes in MSs with their respective regime criteria and characteristics⁸⁹⁵ as well as identified the legal basics to analyse the regimes with respect to its compliance with the EU legal order⁸⁹⁶ the platform is now set to identify suspect elements in MSs REIT regimes. According to ECJ case law, the legal requirements and tax treatments under MSs REIT regimes seem not to comply with EU law fully.⁸⁹⁷ Therefore, in the following suspects elements in MSs REIT regimes with focus to the legal requirements and tax treatment regimes shall be identified and discussed using the “common understanding” version of MSs REIT regimes identified as a benchmark for “fit”.⁸⁹⁸

7.1 Legal requirements

Legal requirements are set under all MSs REIT regimes in order to determine whether a company qualifies for domestic REIT status and, thus, benefit from its regime. Therefore, discriminations refer to measures in relation to the conditions imposed on a company to be eligible for a treatment as a (domestic) REIT.

Almost all MSs require the REIT-company being organised and incorporated under domestic (corporate) laws.⁸⁹⁹ This means that companies, which are formed

⁸⁹⁴ See Cordewener (2002), p.395, 498 et seqq., 530 et seqq., 948 et seq., 967 and 970 et seq.

⁸⁹⁵ See Chapter II, Sec. 5 above.

⁸⁹⁶ See Chapter III above.

⁸⁹⁷ See Sections 3-6 above.

⁸⁹⁸ See Chapter II, Sec. 6 above.

⁸⁹⁹ Domestic laws may not only provide any legal corporate form but also may be subject to fund or trust type forms (see Chapter II., Sec. 5 above). Exception is with the FBI regime only that is a pure tax regime and, therefore, requires the company to comply with the regime’ conditions though.

under foreign law, are generally excluded from the domestic REIT regime even in case of comparability with corporations under domestic law.⁹⁰⁰ This requirement is, however, two folded. The criteria for “legal form” require the use of a legal form available under domestic laws. Where MSs allow for a legal form of a Fund though,⁹⁰¹ REITs incorporated under the laws of such MS may not be recognised in other MS, thus, the requirement for a legal form representing a stock listed corporation is suspect in light of the case law.⁹⁰² Herewith, MSs REIT regimes do not comply with the mutual recognition doctrine following the “Cassis de Dijon”-principle.⁹⁰³ Therefore, any domestic requirements where the use of domestic legal forms qualifying for the domestic REIT regime only are suspect of being a direct discrimination on the grounds of nationality as forbidden under Art. 12 and, thus, harmful to the freedoms of the Treaty too.⁹⁰⁴

Linked to the requirements for the legal form is the condition to the residency of the REIT. MSs regimes require a REIT to be (at least) a domestic resident having its registered seat or (at least) a permanent establishment in the certain MS of which the regimes will be made use. Thus, a non-resident company is not eligible for the domestic REIT regime.⁹⁰⁵ A rule making a distinction between a resident and a non-resident company, however, is suspect of being an indirect discrimination against nationality.⁹⁰⁶ However, according to settled case law the non-resident REIT shall be eligible for domestic REIT regime though.

⁹⁰⁰ See i.e. in the case of the Spanish REIT regime (Cornelisse (2006 Part 1), Recital 2.3.2.1., p. 5).

⁹⁰¹ See i.e. in the case of the FBI the Netherlands allowing for the FGR and in case of the L-REIT allowing Investment Funds as well (see Chapter II, Sec. 5.1.1 above).

⁹⁰² See for summary of case law on company/corporate law Exhibit IV.4-1.

⁹⁰³ See Sec. 3-4 above and Exhibit IV.4-1: Cases on company/corporate law – overview.

⁹⁰⁴ This seems to be the case especially with a view to the freedom of establishment (Art. 49 and 50) and for the freedom of movement of capital (Art. 63) as well (see i.e. Cases “Cassis de Dijon” and “Stauffer”, (see Sec. 3.2 and Sec. 5.3 above).

⁹⁰⁵ See Chapter II, Sec. 5 above. Exception, however, is with the French SIIC under which foreign REITs are eligible for REIT treatment with respect to its domestic (French) Portfolio (see Cornelisse (2006 Part 1), Recital 2.32.2., p. 6).

⁹⁰⁶ See, for instance, Case “Avoir-fiscal” and “Commerzbank” and Exhibit IV.4-1: Cases on company/corporate law – overview. However, there are 4 (i.e. NL “FBI”, GR “REIC”, French “SIIC” and Spanish “SOCIMI”) out of 13 regimes in MSs, which allow for residency in either of the MS (See for details of the identity of the 4 regimes in Chapter II sec. 5.2(1) above, Table II.5.2-1) diminishing discrimination in a EU context in between MSs’ REIT-Companies. Whether this represents discrimination for non-EU companies and, thus, being an infringement of the freedoms of the Treaty, will not be evaluated further since the focus of this chapter is the situation within the EU in between its MS only.

Even where the foreign REIT was established according to (legal) conditions different to the ones required under the REIT regime of the Host State does not entitle the Host State to refuse mutual recognition.⁹⁰⁷ This holds true not only where the foreign REIT is operating in the Host State by way of direct investment while keeping its residency in its Home State, but in situations of transfer of the seat in another MS as well that does not affect its status.⁹⁰⁸ The incoming REIT must not be hindered to move cross-border,⁹⁰⁹ but is to recognise under the domestic regime without setting conditions like prior authorisation or measures having similar effect.⁹¹⁰

Furthermore, this is valid for the requirements to setting minimum amounts for statutory or share capital and with regard to shareholder conditions. Even though, these requirements are not considered to be suspect *per se*, but where in certain situations the Host MS holds up for i.e. higher amounts of share capital and/or different requirements with regards to minimum or maximum shareholder thresholds these criteria are potentially suspect to hindering cross-border activity and, thus, movement of REITs within the EU.

Table IV.7-1: Legal requirements for REITs - Suspect criteria

Requirement	Criteria	MSs Regimes*	Potentially Suspect (y/n)
Legal	Legal form	Corporation / Stock Company	yes
	Share Capital	EURO 15m	yes
	Registered Seat	domestic	yes
	Listing	obligatory	no
	Stock Exchange	regulated stock in either MS/EEA	no
	Shareholder conditions	various ⁹¹¹	yes
* Based on "common understanding" for criteria			

Source: Original by W. Speckhahn

Other criteria in the area of the legal requirements in the context of listing, however, are not suspect. Even though the listing is generally obligatory, all MSs

⁹⁰⁷ See "trilogy" of cases "Centros", "Überseering" and "Inspire Art", Sec. 4 above (see Exhibit IV.4-1: Cases on company/corporate law – overview).

⁹⁰⁸ See Case "National Grid".

⁹⁰⁹ See Case "Lasteyrie".

⁹¹⁰ See Cases "Konle", "Albore", "VBV", "Scientologie" et al. (see Sec. 5.3.2 above and Exhibit V.5.2-1 Case law on (direct) tax – "Equal treatment".)

⁹¹¹ See for details Table II.5.1-3 above.

allow for listing at regulated stock exchanges at least at any stock of either MS though.⁹¹²

In summary there are several requirements and conditions set by certain MSs REIT regimes that are suspect if not already and obviously of discriminatory and restrictive in nature. These measures are suspect to violating the freedom of establishment and the freedom of movement of capital. With respect to the findings of the ECJ case law analysis it seem obviously extant a violation of EU law where MSs REIT regimes do not recognise a duly established REIT from another MS without imposing additional requirements from those being of prior authorisation or licensing that is represented by the requirement of filing local application to joining the regime. This latter topic, however, is dealt with usually in the context of opting for treatment under a domestic REIT regime, which is discussed in the context of the tax treatment subject to the following Subsection though.

7.2 Tax treatment

Whereas in the field of corporate law the Treaty gives EU competence there is none towards direct taxation though. However, case law is having an indirect effect that is driving MSs to revise their regimes in a way to comply with EU law. The latter is emerging in the field of direct taxation since "... national direct tax regimes must be formed in accordance with the requirements set by EU law as interpreted by the ECJ..." as Malherbe points out.⁹¹³

In this context a foreign company shall benefit from the same treatment under the Host State tax regime that is being equally treated though.⁹¹⁴ Thus, where a certain portion of income cannot be deducted for the computation of the taxable base of the foreign company or certain kinds of benefits or tax advantages such as tax credits, deductibility of interest or repayment of overpaid taxes whilst it is eligible for resident companies and may resulting in higher taxes to income generated by foreign companies and might even in effect lead to cash flow

⁹¹² See Chapter II, Sec. 5.1.2 above.

⁹¹³ See Malherbe (2008), Recital 131, p. 57.

⁹¹⁴ See Exhibit IV.5.2-1 Case law on (direct) tax – "Equal treatment" and i.e. Case "Stauffer" and recently Case "Belgium 2012".

disadvantages only, is in breach of Art. 63.⁹¹⁵ Furthermore, shareholders investing indirectly into real property in the Host State shall not experience possible inconsistencies concerning withholding taxation with the Treaty whereas domestic shareholders do not. According to the case law established by the ECJ foreign taxpayers in a comparable position cannot be treated worse than local taxpayers.⁹¹⁶ Hence, foreign taxpayers should be entitled to a refund of the discriminatory withholding. Following the recent Case “Aberdeen” judgement⁹¹⁷, the ECJ believes that foreign investment funds (UCITS-type) should be taxed in a similar manner to the local UCITS vehicles.⁹¹⁸

Moreover, the decision in Case “Stauffer” suggests that where a tax exemption is granted to a domestic entity, if it has specific characteristics, the same exemption shall be granted to a non-resident entity if that entity meets the applicable domestic requirements (except for the residence requirement).⁹¹⁹ Thus, Case “Stauffer” applied in the case of a legally established REIT of one MS another MS providing for a domestic REIT regime as well has to grant the same exemptions considering the tax treatment of the domestic REIT under the domestic regime to the non-resident REIT. Since both REIT companies are of tax-exempt status under their respective regimes and meeting the various legal requirements laid down by its relevant legislation the two entities are in a substantially comparable situation. Different treatment of the foreign REIT would, thus, contravene the fundamental freedoms (free movement of capital or freedom of establishment).

As it was seen above⁹²⁰ income generated by a foreign corporate either from its direct investments in real property or from shareholdings a domestic REIT, both in a Host State situation, will be levied with withholding taxes.⁹²¹ MSs tax regimes usually treat these two situations differently. From a MSs tax revenue perspective the foreign REIT may be viewed to just be a foreign ordinary corporation and taxed according to the treatment applicable to foreign corporations in general

⁹¹⁵ Ibid.

⁹¹⁶ Ibid.

⁹¹⁷ See Case “Aberdeen Alpha”, para 51-54.

⁹¹⁸ See this Chapter above and Case “Aberdeen Alpha”, paras 51-54.

⁹¹⁹ See Sec. 5.3.1(7) above.

⁹²⁰ See above Chapter II, Sec. 5.4.

⁹²¹ See Exhibit II.5.4-1 Taxation of REIT – overview.

which holds real estate investments and deriving income there from.⁹²² But from a EU law perspective MSs view should be towards the foreign REIT and its domestic activities equally as to activities of domestic REITs in order to prevent discrimination on grounds of nationality though according to settled case law according to the Schumacker-doctrine of equal treatment.⁹²³

This requires the domestic regime generally to being eligible and to providing the possibility for the foreign REIT to opt and to comply with the conditions under the domestic REIT regime respectively though, but is usually ignored as the example of the FBI illustrates. It shall be made clear that the FBI regime offers any foreign corporation and REIT to opt for FBI status, even though subject to comply with the conditions set under the domestic FBI regime, including i.e. transfer of seat, changing legal form and/or meeting other conditions though.⁹²⁴ However, the obvious that any corporation meeting domestic requirements, thus, becoming a domestic corporation is eligible for treatment under the domestic regime shall not be questioned in this context. Other regimes generally refusing foreign REITs to opt for status of the domestic regime provide further discriminating rules in detail such as in connection with the residence of shareholders⁹²⁵ or their residence.⁹²⁶

⁹²² This ordinary taxation of foreign corporate' income from its domestic activities is out of scope of this analysis and, therefore, not further is evaluated.

⁹²³ See above with reference i.e., but not limited to, Cases "Avoir-fiscal", "Commerzbank", "Centros", "Überseering", "Inspire Art", "Schumacker" and "Stauffer".

⁹²⁴ In this respect, the foreign REIT, even though it might comply with the conditions (except for residence and legal form (see Cornelisse (2006 Part 1), recital 3, p. 7 et seq.) for FBI treatment, is not eligible for tax-exempt treatment under the FBI regime though. Even where a foreign REIT invests in the Netherlands and is generally eligible to opt for status of FBI and being treated equal to a domestic FBI will not receive its income derived from local property tax exempt, neither in case of a direct nor indirect investment. Under the FBI regime certain categories of domestic taxpayer are entitled to an exemption from withholding tax, whereas foreign shareholders generally are not. The FBI is entitled to a cash payment in connection with foreign withholding tax imposed on income received. As the FBI is not able to credit the foreign withholding tax and such withholding tax cannot be used by its shareholders upon redistribution of the foreign-source income to its shareholders, the FBI is entitled to a cash payment to the shareholder in lieu of a tax credit. Such a payment is only available to the pro rata part of the foreign withholding tax that relates to the percentage of Dutch-resident taxable shareholders of the FBI. That is to say, no payment is made if the REIT shares are owned by (foreign) non-resident shareholders or Dutch shareholders that are not subject to tax (i.e. as in case of pension funds or life insurance).

⁹²⁵ Example hereto is given under the Italian SIIQ regime where exemption from the levy of withholding tax on distribution is granted in case of shareholders resident in a "white list" country only. This "most favoured nation treatment", however, may be in line with the Treaty according to Cornelisse (2006 Part 1), p. 7 with reference to the ECJ and its decision in Case C-376/03, "D v Inspecteur van de Belastingdienst / Particulieren / Ondernemingen buitenland te Heerlen", (2005), ECR I-5821.

⁹²⁶ Such suspect treatment is found under the Belgian SICAFI regime. Under this regime exemption from withholding tax on distributions made by a SICAFI is provided under the condition

Rather, according to settled case law and the result of the analysis regarding case law on company law the rule mutual recognition require MSs to mandatory provide foreign REITs access, thus, the option for beneficial tax treatment under their respective domestic regime.⁹²⁷

In this category of factually eliminating the possibility foreign REITs to opt for Status of the Host State REIT regime fall the cases of prior authorisation or measures having similar effect too. ECJ case law is clearly driving off any conditions that seek for prior authorisation in the Host State prior to the conduct of activities⁹²⁸, prior to the acquisition of real property by the foreign REIT⁹²⁹ or even prior to marketing of its shares to domestic shareholders.⁹³⁰ Such authorisations may be lawful though where such rules i.e. provide for a detailed definition of the specific subject to the requirement, thus, being legally certain only.⁹³¹ Thus, such requirements are suspect of violation the freedoms though unless proven differently.

Table IV.7-2: Tax treatment for REITs - Suspect criteria

Requirement	Criteria	Domestic REIT*	Foreign REIT	Potentially Suspect (y/n)
Tax treatment	REIT regime option	eligible	not eligible	yes
	Direct investment		ordinary treatment for non-resident corporate	
	income tax	tax exempt		yes
	capital gains tax	tax exempt	ordinary treatment	yes
	Indirect investment	tax exempt, unless not qualified	max. 20% withholding tax	yes
* Based on "common understanding" for criteria				

Source: Original by W. Speckhahn

Finally, where a foreign REIT invests directly or indirectly in domestic property discrimination arises. In these cases income and capital gains from direct investment is generally taxed according to ordinary rules for non-resident

that the SICAFI invests more than 60% of its assets in real estate located in Belgium. Thus, investments by a SICAFI in domestic qualifying assets are treated favourable compared to cross-border investments. (See above Chapter II, Sec. 5.1.3).

⁹²⁷ See Sec. 4 and 7.1 above

⁹²⁸ See Case "Scientologie", para 18.

⁹²⁹ See Case "Albore", para 16 and Case "Konle", para 23.

⁹³⁰ See Case "VBV", para, 25.

⁹³¹ See Case "Scientologie", para 21.

corporations as well as any income from indirect investments is generally levied with withholding tax before its distribution though.⁹³² With a view to the tax treatment rules it is, thus, to conclude that all of the criteria set in MSs REIT regimes are suspect of “misfit” to the freedoms.

7.3 Summary of conflicts

According to settled case law MSs are to recognise a REIT duly established in its Home State accepting it operating in the territory of a Host State though without imposing any additional requirements irrelevant of its compliance with any conditions set for the domestic REIT though. With respect to the legal form there are a few regimes only that are expressively open for a “foreign legal form” similar to the domestic ones that qualify.⁹³³ Almost all MSs regimes do not recognise the foreign REIT even legally established in one MS, but must furthermore comply with the conditions by the domestic REIT regime of another MS REIT regime still.⁹³⁴ In the absence of mutual recognition and bilateral contracts in between MSs providing i.e. for “a most favoured nation” treatment, the foreign REIT is treated according to the ordinary domestic applicable tax regime. Hence, the foreign REIT is treated as a foreign corporate generating directly or through a domestic subsidiary income from real property. Similar situation is where withholding taxes are levied on distributions made by the domestic REIT to its foreign corporate shareholder.⁹³⁵

⁹³² Similar case is provided under the German tax regime under which withholding tax is levied on dividends distributed to non-resident corporate shareholders while resident shareholders receive a tax credit or tax rebate in the amount of such withholding tax though. However, in light of EU law the foreign REIT or shareholder should be entitled to claim refund of foreign withholding tax on its dividends received from the domestic REIT equally (see Case C-284/09, “Commission v Germany”, (2011) of 20 October 2011; Cornelisse (2006 Part 1), recital 3.1, p. 7).

⁹³³ See Chapter III, Sec. 2.2 above with reference i.e. but may not be limited to the FBI and the SIIC, whereas for other MSs it is to analyse in more detail, even though, out of scope of this thesis though, to identify whether other MSs regimes allow for foreign legal forms as well or, in light of the relevant case law, the certain MSs recognises foreign legal forms for its domestic REIT regime as well. This shall, however, be subject to the analysis in the cases studies though but should be not of issue anymore after the Cases “Cassis de Dijon” and “Stauffer” especially (see Chapter IV, Sec. 3 and 5 above).

⁹³⁴ Hereto, reference will be made and discussion will be given to the ECJ Case “Cassis de Dijon”, (see Chapter IV, Sec. 3.2 above).

⁹³⁵ It was found that i.e. corporate shareholders are generally treated equally, even though economically only. Here, the foreign corporate shareholder may be levied with higher tax rates compared to the domestic one might be eligible to call for relief under an applicable DTT and may also benefit from the EU Parent-Subsidiary Directive. Thus, conclusion is drawn that the corporate shareholder may be even treated advantageous compared to the domestic corporate shareholder. Therefore, where the case of a foreign REIT investing in another MS REIT is treated like any other (domestic?) corporate shareholder this situation may not be suspect for any discrimination on

Overall, the differential treatment under domestic regimes towards foreign REITs either with regard to the legal requirements or the tax treatment is suspect of violating EU law. Setting legal requirements, thus, limiting of options to apply for the domestic REIT regime or, thereby, setting prior conditions for authorisation, is a ring-fencing for domestically established REITs. This treatment and its respective rules in MSs REIT regimes are, therefore, suspect of discrimination on grounds of nationality.

Table IV.7-3: Summary of suspect elements in MSs REIT regimes - overview

Criteria	Condition	Requirement/Limitation	Suspect
Legal requirements	Legal form	Domestic (corporate) laws	discrimination on grounds of nationality
	Residence	Domestic, at least through a PE	discrimination on grounds of nationality
	Recognition of foreign REIT	Licensing / Authorisation	discrimination on grounds of nationality
			violation of freedom of movement of capital
Tax treatment	REIT status	License / Authorisation to benefit from tax treatment under domestic REIT regime	violation of freedom of movement of capital
			violation of freedom of establishment
	Application of domestic REIT regime	Income from domestic investments	violation of freedom of movement of capital
			violation of freedom of establishment
	Distribution of dividends to shareholder w/o withholding tax levied at source	Qualifying resident taxpayer	violation of freedom of establishment
			violation of freedom of movement of capital
			discrimination on grounds of nationality

Source: Original by W. Speckhahn

grounds of nationality from a pure corporate shareholders perspective though (see Chapter II, Sec. 5.4.3 above).

8. Conclusion

According to the decision by the ECJ, although direct taxation falls within the sole competence of the MSs, they must nonetheless exercise that competence consistently with EU law⁹³⁶, thus, in accordance with the Treaty's principles and its freedoms enshrined having nearly unlimited priority without the need for tax regulations being harmonised.⁹³⁷ In this respect neither the Schumacker-doctrine nor the following case law of the ECJ is limited to Individuals rather unfold implications on the treatment of companies as well. This statement holds true in general since the decision of the ECJ in Case "Avoir fiscal"⁹³⁸ according to which it is the company's "seat" that serves as the connecting factor with the legal system of a particular state. In other words, concludes Barnard⁹³⁹, a company's seat has the same function for companies as nationality does for individuals. Therefore, provided that a company in the EU was lawfully established under the rules of its Home State it must be recognised with its legal form in the Host State irrelevant of the Host State rules even where the Host State provide for a different view on the establishment of companies under its domestic laws.⁹⁴⁰ Consequently, income derived from cross-border economic activity must be taken into account in the state of source of the relevant income that is either the Home State or a Host State.

Furthermore, settled case law has made clear that where there is any type of prior authorisation or licensing of a foreign REIT conditional to conduct activities and/or benefiting of the domestic regime and its tax treatment such provisions are discriminatory and, thus, violating the freedom of movement of capital.⁹⁴¹

⁹³⁶ See i.e. Case C 374/04, "Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue (UK)" (Case "Test Claimants"), (2006), ECR I-11673; Case C-379/05, "Amurta v Inspecteur van de Belastingdienst" (Case "Amurta"), (2007), ECR I-9569; Case C-540/07, "Commission v Italy", (2009), ECR I-10983, para 28 and Case C-284/09, "Commission v Germany", (2011), ECR I-09879, para 44.

⁹³⁷ See Case "Avoir Fiscal", para 107 and more recently Case C-287/10, "Tankreederei I SA v Directeur de l'administration des contributions directes", (2010), ECR I-14233, para 14 and case law cited as well as Case C-155/09, "Commission v Greece", (2011), ECR I-00065, para 39, Case C-10/10, "Commission v Austria", (2011), ECR I-05389, para 23 and Case C-9/11, "Waypoint Aviation SA v État belge – SPF Finances", (2011), ECR I-09697, para 19.

⁹³⁸ See Case "Avoir fiscal", para 18.

⁹³⁹ See Barnard (2004), p. 324.

⁹⁴⁰ See Sec. 2.3 and 2.4 above with reference to respective case law i.e. Cases "Cassis de Dijon", "Centros", "Überseering" and "Inspire Art".

⁹⁴¹ See Sec. 5.3.2 above with references to i.e. Cases "Kohnle", "Scientologie" and "Belgium 2011" (see Exhibit IV.5.3: Case law on (direct) tax – Access to tax of non-resident companies).

Considering the rule of mutual recognition in light with the fact that under almost all of the MSs REIT regimes the option for status for foreign companies is either not eligible at all or subject to meeting specific conditions under the domestic regime only there is clear violation of EU law.⁹⁴² Even though the Treaty provide for grounds of justification these grounds have generally not been successfully evoked by MS, neither on grounds of fiscal supervision, the coherence of tax systems, nor a balanced taxation⁹⁴³ rendering these grounds rather fictitious though.⁹⁴⁴

Therefore, applying the case law analysed to the case of a REIT corporation that is validly established in one MS it follows that it must be recognised having legal personality and legally acknowledged as a company legally established without the need to meeting neither further requirements nor additional conditions.⁹⁴⁵ Even though ECJ case law builds a secondary source, but is part of EU primary law it is as such directly applicable. Thus, downloaded to the MSs must be applied to the domestic legal order though. Herewith, the EU is impacting “indirectly” MSs sovereignty in direct tax using the ECJ case law and the freedom unlimited priority. As a result MSs REIT regimes do not pass the “goodness of fit” test. The provisions for legal requirements and especially the tax treatment rules discriminate non-resident REITs representing a violation of the freedoms. The freedoms under which the ECJ assessed harmful practices have been the freedom of movement of capital, Art. 63, and the freedom of establishment, Art. 49. Consequently, MSs provisions for legal requirements and tax treatment “misfit” with EU law.

There is not only impact of the EU downloaded to the MSs, there is, furthermore, measurable impact in the case of those MSs having been “Party” to the proceedings too. Not all of the MSs providing for domestic REIT regime⁹⁴⁶ have been subject to ECJ judgements with their tax treatment at issue in the main

⁹⁴² See Sec. 7.2 above.

⁹⁴³ See Sec. 6.1 above.

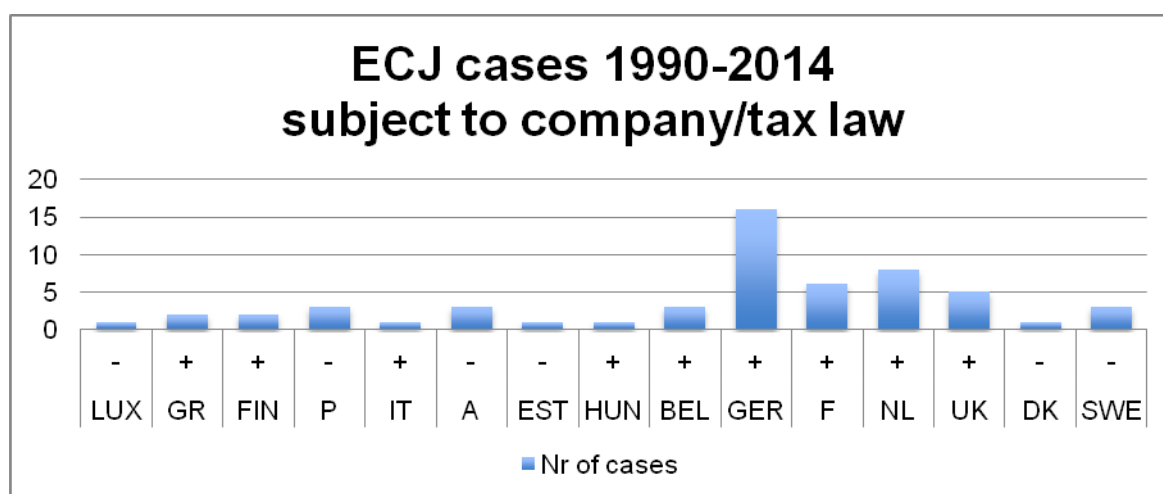
⁹⁴⁴ See Sec. 6.2 above.

⁹⁴⁵ Whether this lead to an automatic qualification as a REIT in that other MSs obviously depend on the existence of a REIT regime in that MS. Where the MS does not provide for a domestic REIT regime there is no room for asking for any beneficial (tax) treatment. However, this situation changes in MSs that provide for a domestic REIT regime though.

⁹⁴⁶ MSs providing for REIT regime domestically are marked “+” in Figure V.8-1.

proceedings though. MSs such as Bulgaria, Spain, Ireland and Lithuania for example have not been subject to any proceeding under this topic over the term analysed. MSs having been subject to proceedings have been primarily four of the core MSs, which are Germany, France, the Netherlands and the UK responsible for 35 of the total 56 cases of the sample analysed, which represents 75% of the cases in the MSs Group of MSs providing for domestic REIT regime comprising of total 44 cases.⁹⁴⁷

Figure IV.8-1: MSs subject to main proceedings before ECJ



Source: Original by W. Speckhahn

These MSs had significantly to adjust their domestic tax regimes as a consequence of ECJ judgements, whereas, where the facts of these cases were equally or similar in other MSs domestic regimes the regimes might not have been adjusted due to the judgements having effect *inter partes* that is in between the parties of the proceedings only. Thus, there is no automatic effect towards MSs not having been involved in the proceedings even though sharing the same concepts as it was seen as a result of the comparative analysis. In those cases, however, adaptational pressure extant is to conclude towards MSs company and tax laws though.⁹⁴⁸ Since, however, the analysis and results of this chapter are made on the basis of the “common understanding” model of the MSs REIT regimes as defined in Chapter II above⁹⁴⁹ and, thus, based on a broad or

⁹⁴⁷ Of the 56 Cases the remaining 21 cases are split among a group of 11 MSs of which a quarter (5 MSs, which are Greece, Hungary, Finland, Italy and Belgium) each account for max up to 2 cases in the period of the last almost two decades.

⁹⁴⁸ See Sec. 7 above.

⁹⁴⁹ See Chapter II, Sec. 6 above.

“averaged” model only, the impact of the EU is visible in general, but shall be subject to validation in specific “real life” terms though. This validation, however, shall be subject to the case studies in the following chapter though.

Section 3 –

“Outcome”: The Impact of the EU

Chapter V: REITs in MSs - Case Studies

1. Objectives for this Chapter

Following the identification of specific rules in national company laws and suspect regulations in MSs REIT regimes, MSs may have reacted and revised their national laws for compliancy. The research now presents case studies of France, Bulgaria and Spain for an in-depth analysis of their REIT regimes, their alignment with the “common understanding”, and domestic environment influencing the REIT regime. Findings from the previous chapter give guidelines for analysis of suspect provisions and evidence of impact by the EU on REIT as proof of Europeanization.

The objectives of this chapter with regard to each of the REIT regime case studies are:

- In-depth analysis to identify specific criteria in regard to legal requirements and tax treatment;
- Identify “goodness of fit” for provisions suspect of violating EU law;
- Investigate adaptational pressure; and
- Evaluate processes of Europeanization.

The cases are the REIT regimes established by France, Bulgaria and Spain. These countries show variance in their constitutional structure, administrative culture, judicial structure and structure of civil society so that it is expected to see variance in the form and degree of Europeanization of its REIT regimes. By using Bulgaria and Spain additional to France the research contributes to Europeanization research as few studies have focused on the relationship

between the behaviour of smaller⁹⁵⁰ MSs in the EU and the degree of adaptation to the external environment of the Union, not only the “usual suspect”⁹⁵¹ cases of MSs such as Germany and France.

All three case studies have established their REIT regimes in the first decade of this century, benefited from the experiences of first established REIT regimes and the classical US-REIT, and benefited from the ECJ case law that has developed. France is a core MSs with an experienced (SIIC) REIT regime (established in 2003). Bulgaria joined the EU in 2007, and created a EU law compliant REIT regime (JSSPIC) from 2004, a regime attractive to FDI and competing with other MSs regimes in the EU. Bulgaria thus provides a different starting position. The third case is Spain, the 4th largest real estate market in Europe (after the German, UK and French), which came late to REITs under pressure from the markets in an attempt to assist the failing housing market and benefiting from emerging ECJ case law.

2. The French REIT – SIIC

2.1 The well-established EU Case

France, one of the “core” countries and promoters of the EU, was the third MS to introduce a REIT regime after the Netherlands (1969) and Belgium (1995) in 2003 only as “Sociétés d’Investissement Immobilier Cotée” (SIIC)⁹⁵² partly inspired by the classical US-REITs.⁹⁵³ The SIIC regime followed tax transparent real estate companies and investment fund structures in the Netherlands, Belgium and Germany, to make the French real estate market more attractive

⁹⁵⁰ See Haverland (2007/2005). Spain may not be considered as a small MS, but a “small(er)” economy different by size versus Germany, UK or France and, thus, not part of the “usual suspects” group (see Vink/Graziano (2007), p. 17).

⁹⁵¹ See Vink/Graziano (2007), p. 7.

⁹⁵² SIICs have been introduced by the Finance Act (Loi de Finance) 2003, Loi. 202-1575 of 31.12.2002, published at Journal Officiel 31.12.2002. This regime is governed by articles 208 C, 208 C bis, 208 C ter and 219 IV of the French tax code (FTC). The SIIC regime has been amended by the Amended Finance Act for 2004, the Finance Act for 2005, the Amended Finance Act for 2006, the Amended Finance Act for 2007, the Finance Act for 2008, the Finance Act for 2009, the Amendatory Finance Act for 2009 and the Finance Act for 2012. In addition, the French tax authorities (FTA) published administrative tax guidelines on September 25, 2003, February 01, 2010, December 27, 2011, March 08, 2012 and on June 15, 2012.

⁹⁵³ LefèvrePelletier (2005), p. 11

for investments in this market⁹⁵⁴. The French government wanted to vitalize the French real estate market and lower its budget deficit through the disclosure and taxation of inner reserves of firms transforming to SIIC status. The French approach to REITs has been sensible and successful⁹⁵⁵ especially due to the prolongation of tax exemption to promote the dynamic of the market.

France was concerned about loss of tax revenue associated with granting French companies tax transparency and, therefore, charged companies an exit tax in order to convert.⁹⁵⁶ The regime helped France to promote the listed property sector with SIICs representing the second largest property portfolio by assets under management in the EU after the UK.⁹⁵⁷ The requirements towards listed companies and the pressure for transparency along with the tax benefits provided liquidity in the market by the SIICs.⁹⁵⁸

Established in 2003, the SIIC regime is an example of a REIT regime, which has shown high compliance with EU law and adjustments according to ECJ case

⁹⁵⁴ IFD (2005), p. 75. There is, however reason for, as like in Germany the French market has a history of providing for a funds regime since long. The OPCI⁹⁵⁴ regime is similar i.e. to the German OEPP regime that was the first offering to retail investors providing for a means to invest capital i.e. small savings funds by private individuals into large scale real property assets and schemes and to benefit from professionally managed real estate and its returns. An OPCI ("Organismes de Placement Collectif en Immobilier" (eng.: property funds) is a collective investment scheme specialising in real estate and intended for the general public. Its structure and legal framework is broadly inspired by those of collective investment schemes. Some versions of this product are intended for institutional investors (e.g. leveraged and unleveraged OPCIs with streamlined operating rules). OPCIs can take the form of an open-end real estate investment company (SPICAV), which is equivalent to an open-end investment company (SICAV), or an unincorporated real estate investment fund (FPI), equivalent to an unincorporated investment fund (FCP). OPCIs are supervised by the securities regulator, the AMF, from whom they must obtain authorisation before doing business.

⁹⁵⁵ France witnessed its first successful public offering under SIIC regime of "Société de la Tour Eiffel" in July 2004.

⁹⁵⁶ Given, that all of the major French listed real estate companies have converted, it appears that the exit tax was set at a reasonable level. As a result, companies converting to become SIICs generated additional tax revenues of approximately €1.5bn in the first years already (see Financial Times Deutschland (2004), Nr. 210).

⁹⁵⁷ The market capitalisation increased from some Euro 11,1 bn in 2003 to Euro 45,35 by end of July 2012, an increase by more than 400% over a period of 10 years (see EPRA (2013b), France, p. 2).

⁹⁵⁸ Nappi-Choulet (2008), p103. There are currently 40 SIICs listed at the Paris Stock Exchange.⁹⁵⁸ SIICs primary investment focus is mainly on Office (60%), Retail (34%) and Industrial (4%) while others represent for a small cap only (2%). However, geographically they are almost exclusively investing in the French market where the greater region of Paris ("Ile de France") is of focus. The Top five SIICs represent themselves €31.69bn (rounded) that is almost 70% of the French SIIC' total capitalisation already. However, the SIICs reflect 5.91% of the global REIT market already and are to be recognised third in the global ranking with its global REIT market capitalisation (see EPRA (2013b), France, p. 2).

law. France has been directly subject to seven ECJ cases decided in the last two decades. Of 57 cases analysed in this thesis, France ranks third after Germany and the Netherlands as party to the ECJ. France has adjusted its domestic regimes, involving negative integration and Europeanization.

2.2 The SIIC regime

Since France has significant experiences with its REIT regime at a time of considerable case law with tax treatment of cross border investments and an example of an EU law compliant REIT as a blueprint for the EuroREIT. The following analysis will provide a detailed overview of its SIIC regime to test the criteria for compliance with EU law as interpreted by ECJ case law.

2.2.1 Legal requirements

The SIIC regime is available to corporations whose capital is divided into shares (“actions”). SIICs are legally based by its legal nature of a SA⁹⁵⁹ or a SCA⁹⁶⁰ with a minimum paid in equity of €15mn.⁹⁶¹ To obtain SIIC status corporations do not have to operate under French law or be incorporated in France but only be subject to French corporate income tax. Any such company may elect, provided that it meets the activity test and is directly or indirectly held at 85% or more by a listed SIIC parent company.⁹⁶² That holds true for companies incorporated under foreign law and/or resident outside France complying with other SIIC conditions.

With the 2009 and recently the 2010 Finance Act, the SIIC regime may also be available to EU companies or non-EU companies listed on a regulated stock exchange market that meets the requirements of the FIM-Directive.⁹⁶³ Qualifying foreign entities no longer have to seek a secondary listing in France to benefit from the SIIC regime, which also does not impose a residence condition. The French tax administration has already accepted that foreign

⁹⁵⁹ “Société anonyme”.

⁹⁶⁰ “Société en Commandite par Actions”.

⁹⁶¹ See Article 208 C sec. I, II CGI

⁹⁶² See Article 208 C CGI

⁹⁶³ See “FIM-Directive”.

companies are eligible for the SIIC regime in respect of their French property portfolio, provided other conditions are met.⁹⁶⁴

Some shareholder conditions have to be met for SIIC status, relating to both, the Individual as well as corporate shareholdings limited to maximum of 60% for a single shareholding and/or voting rights. Additionally, a SIIC must safeguard for a free-float of its shares at a minimum of 15% of the shares/voting rights provided that each single shareholding does not represent less than 2% of the voting rights.

2.2.2 Tax treatment

With the SIIC regime France introduced a pure tax regime applicable to listed real estate asset investment companies. Any eligible real estate investment company listed on a stock exchange may elect for SIIC status within 4 months from the beginning of the financial year in which the SIIC regime will apply for the first time. An election may also be made by any subsidiary directly or indirectly held at 95% at least by the SIIC parent and having qualified activity. If companies transform to SIIC status their inner reserves have to be newly valued and are taxed with a rate of 16.5% of the unrealized capital gains on the assets in the eligible portfolios paid in up to four instalments over four years.⁹⁶⁵ On merger of two SIIC their respective inner reserves can be tax exempt if they will be distributed to its shareholders at a rate of 50% within a period of two years following the merger.⁹⁶⁶

SIICs and qualified corporate subsidiaries are not generally exempt from French corporate income tax, but income deriving directly or indirectly from qualified activities is tax exempt. Additional non-qualifying business is subject to French corporate income tax at 33.3%. Dividends of subsidiary-SIICs are taxable at the level of the members and tax exempt if such members are themselves exempt under the SIIC regime. If the shareholding by the mother income is at a rate of

⁹⁶⁴ See EPRA (2013b), France, Recital 2.2, p. 3.

⁹⁶⁵ Interestingly, French fiscal authorities have received a total sum of €1,43 bn in 2003 by way of this entry tax. The highest amount derived from the company called "Gecina" at €573mn. However, in 2004 still €100mn was paid due to entry taxation.

⁹⁶⁶ IFD (2005), p. 79 by referring to the French Finance Act of 2005

95% and 100% of these dividends are being fully distributed to the shareholders of the mother-SIIC. Distributions of dividends from the SIIC to its shareholders are subject to different tax treatment depending on whether they are paid out of exempt or taxable profits or gains. The conclusion that finally and economically there is no taxation at SIIC level is not correct. With the Finance Act for 2010 the French government has replaced the local business licence tax with the CET, composed of two different taxes:

- a real property contribution ("CFE"), assessed on the rental value of real estate assets (equipment and movable assets, which were subject to business tax, are no longer taxed), and
- a contribution on the added-value ("CVAE"), assessed on the value added produced by the company at a progressive rate ranging from 0% (for companies with turnover less than € 500.000) to 1,5% (for companies turnover higher than €50m) of the added value.⁹⁶⁷

Since real estate property owners/lessors were previously outside the scope of application of the TP (the lease or sub-lease of buildings were not considered as business activities), they now fall within the scope of the CET. The reform aims to catch income and gains of real estate investment vehicles such as SIICs (and also OPCIs), their subsidiaries and any company leasing real estate assets. This eliminates the discrepancy between furnished leases (previously subject to the business licence tax) and unfurnished leases of buildings (previously outside the scope of the business tax). Whereas, the CFE will not be an issue at SIIC level for the corporation itself as the tenant is liable for such tax, as regards the CVAE will be taxed at corporate level and, therefore, fully impact the SIIC at its (REIT) level. CVAE does adversely impact French or foreign real estate investment funds, who cannot shift the tax burden to the tenant by charging it on top of the leasing fees, given that the CVAE is not directly linked to one or several buildings but to the overall activity of the lessor. As a transition the CVAE will be applied progressively by 10% annually starting at 10% for 2010. As a consequence the SIIC is no longer a fully tax-exempt regime. It is different for the foreign shareholder in the domestic SIIC. Withholding tax applies to

⁹⁶⁷ See Immobilien Zeitung (2009).

dividend distributions to the foreign shareholder of the SIIC at a rate of 25% or 15% respectively in case bilateral tax treaties apply.⁹⁶⁸

Electing for the SIIC regime does not trigger any taxation at shareholder level, either pursuant to a constructive distribution rule or in the latent capital gains on shares of the SIIC. Corporate Income Tax does not apply for qualifying income, which is excluded from taxable base. A return of capital distribution is for both corporate and individuals normally tax-exempt. Dividends received by French resident individuals from an SIIC, or a qualifying subsidiary having elected the SIIC regime, have been subject to different tax treatment depending on whether they are paid out of exempt or taxable profits or gains. For French investors in France, the SIIC regime is not especially worthwhile, as most of the tax-free profit made by a property company must be distributed to its shareholders who, if residents of France, are taxed.

2.3 SIIC findings

With regard to the “common understanding” model of the European REITs, the SIIC seems to provide more flexibility ' allowing entities to be incorporated under foreign laws and, thus, does not require for certain minimum thresholds for statutory capital though. This flexibility was not part of the regime from its establishment, rather a consequence from Case “Avoir fiscal”⁹⁶⁹ where France was found in breach of the freedom of establishment, a requirement later confirmed in Case “Lasteyrie”. The SIIC regime today is not in violation of EU law. Like its European peers the SIIC require shareholder conditions, which have been identified of being suspect according to ECJ case law.⁹⁷⁰

⁹⁶⁸ Article 125 A CGI. According to an uninterrupted series of decisions rendered by the French Supreme Tax Court (Conseil d’Etat), foreign companies or entities that rented real estate property in France, were subject to corporate income tax in France, irrespective of whether or not they had a permanent establishment in France, unless a tax treaty provided otherwise. However, a recent decision rendered by the Conseil d’Etat (see Conseil d’Etat, no. 296471, 31 July 2009, Overseas Thoroughbred Racing Stud Farms), has given rise to diverging interpretations and possibly has weakened the legal ground for taxation. The Amended Finance Bill 2009 expressly introduced a provision in the French tax code specifying that, as a matter of principle, income derived from French-based real estate property or gains realized on the sale or transfer of real estate property located in France are subject to French corporate tax unless a tax treaty provides otherwise (which is rarely the case).

⁹⁶⁹ See Case “Avoir fiscal” and Chapter IV, Sec. 3.3 above.

⁹⁷⁰ See Chapter IV, Sec. 7.1 above.

Table V.2-1 ECJ cases on France – Summary

#	Year	C-	Case	MS	Freedom	Decision
3	1986	270/83	Avoir fiscal	F	Right of Establishment	Companies are free to choose the appropriate legal form in which to pursue its activities in another MS (Host State) that freedom could not be limited by any type and measures of discriminatory tax provisions.
8	2003	9/02	Lasteyrie	F	Right of Establishment	MSs are precluded of measure linked with moving of companies likely to hinder a company to move cross-border breaches the freedom of establishment
Equal treatment						
21	2011	384/09	Prunus	F	Free movement of capital	A permanent regime of tax levied on direct holdings of non-resident companies constitutes a restriction of the freedom.
Prior authorisation						
26	2000	54/99	Scientologie	F	Free movement of capital	Any rule of authorisation may be lawful though where investors subject to the authorisation are given indication as to the specific circumstances in which the authorisation is required, otherwise a rule contravene the principle of legal certainty
Tax benefits						
27	1986	270/83	Avoir fiscal	F	Right of Establishment	Tax credits shall be eligible for non-resident companies in Host State
49	2012	338/11	Santander	F	Free movement of capital	Different rules for resident and non-resident companies with no permanent establishment violates the freedoms.
51	2004	9/02	Lasteyrie	F	Right of Establishment	Taxation of unrealised capital gains at the time of transfer of the residence violates the freedom

Source: Original by W. Speckhahn

The tax treatment regime provides the possibility to opt for SIIC status. However, a foreign company can benefit from the SIIC exemption regime if meeting the applicable conditions. Thus, a foreign REIT listed on a regulated EU stock exchange may apply for SIIC regime, not directly itself for its direct or indirect qualifying operations. According to French tax regime a company may be subject to French corporate tax only if resident in France. Thus, the foreign

REIT may elect for SIIC status if it transfers its seat to France becoming a French resident REIT or having a permanent establishment in France subject to French corporate tax. The foreign company's French assets and shares of qualifying French subsidiaries will be recorded as assets of the branch for French tax purposes. As a general rule, foreign REITs are now treated as French entities so that they may be assessed for corporate tax in France in respect of French-source real estate income and gains. Eligible REITs can be exempt from French corporate tax for qualifying real estate income and gains under the SIIC regime.

It very quickly became obvious that the SIIC regime was very attractive for foreign investors.⁹⁷¹ While dividends distributed by the SIIC do not generally come under the scope of the parent-subsidiary regime under the EU Parent-Subsidiary Directive, they are only subject to a withholding tax of 25% and can usually benefit from reductions in the tax rate in bilateral tax treaties to 15%. EU corporate shareholders owning more than 25% of the capital of an SIIC are not eligible for the withholding tax exemption. For these substantial shareholdings capital gains realised on the sale of the SIIC shares are taxable instead.

There is differential treatment of domestic and cross-border distributions. Dividends paid by a SIIC to the non-resident shareholder are subject to dividend withholding tax⁹⁷², with an exemption if the dividends paid to a resident shareholder. Property income of French subsidiaries, benefiting from the SIIC regime flow to the foreign EU parent companies/REITs, free of any French tax, as the French tax authorities have opened up the SIIC regime to foreign companies that meet conditions for SIIC status. Moreover, it is most likely that France cannot impose withholding tax on dividends distributed by a SIIC to its French resident, as France does not impose a withholding tax on domestic

⁹⁷¹ Consequently, the SIIC regime has attracted a number of foreign companies such as Corio, Rodamco Europe and Wereldhave (Netherlands), Hammerson (UK), Cofinimmo and Warehouse de Paw - (Belgium) (See EPRA (2013b), France, Recital 1, p. 2).

⁹⁷² This regime was already subject to Case "Prunus" and held to constituting a restriction of the freedom of movement of capital (see Chapter IV, Sec. 5.3.1 above).

dividends.⁹⁷³ Conditions to access have been held in violation of the free movement of capital in Case “Scientology”.⁹⁷⁴ The ECJ held France in violation of EU law with their tax regime in treating residents different to non-residents in Cases “Avoir fiscal”, “Santander” and “Lasteyrie”.⁹⁷⁵

Where the foreign REIT operating in France may neither apply for SIIC status nor benefit from beneficial treatment, the profits (i.e. rental income) from a direct investment in French real property by the foreign REIT will be taxed under ordinary rules for foreign companies under the FTC. Unless such domestic company meet the requirements for subsidiary to the foreign REIT, which in turn meets the conditions for SIIC, it will be taxed at ordinary rates. Though the SIIC regime was has experienced the development of the case law, France seems reluctant to go beyond what is absolutely necessary to comply with judgements, this can represent a true case of downloading from the EU level, where France has accepted the adaptational pressure from the case law and adjusted accordingly.

Table V.2-2: Legal and Tax overview on the French SIIC regime

Requirement	Criteria	SIIC	European REITs*	Suspect*
Legal requirements	Legal form	SA, SCA or any legal form on shares, incl foreign	Corporation / Stock Company	no
	Registered Seat	domestic (either MS)	domestic	no
	Listing	obligatory (either MS)	obligatory at regulated stock in either MS	no
	Shareholder Conditions			yes
	corporate holdings	max. 60% single	max. 30%	
	shareholding by individuals	max. 60% single	min. 25 %	
	free-float	min. 15% with each less 2% voting rights	min. 25 %	
	voting rights	see free-float	min. 25% by individuals max. 50 by corporate	

⁹⁷³ This holds true except in case where the Parent-Subsidiary-Directive applies. However, as the foreign REIT is a tax exempt entity the Directive is not applicable though (see Case “Denkavit” and Cornelisse (2006 Part 1), recital 3.2, p. 8).

⁹⁷⁴ See Chapter IV, Sec. 5.3.2 above.

⁹⁷⁵ See Table V.2-1.

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE

CASE STUDIES

Tax treatment (foreign REIT)	REIT regime option	election for SIIC regime possible	not eligible	yes
	Direct investment			
	income tax	taxation according ordinary rules	taxation according ordinary rules	yes
	capital gains tax	taxation according ordinary rules	taxation according ordinary rules	yes
	Indirect investment	25% withholding tax, but may be reduced under DTT to 15%	max. 20% withholding tax	yes
* Model of “common understanding”				*SIIC violating EU law

Source: Original by W. Speckhahn

The French REIT regime does comply with EU law to a significant extent, especially for the openness for other MSs legal forms of companies, according to the “Dassonville-Formula” and the “Cassis de Dijon-principle” following Case “Avoir fiscal”.⁹⁷⁶ Effectively, a foreign REIT as a shareholder in a domestic REIT is treated according to the ordinary rules for non-residents, a treatment suspect of discrimination on grounds of nationality.⁹⁷⁷

Other than proceedings where France has been party, there is limited evidence for impact from case law on domestic regimes. Rather, the option for SIIC status is effectively neither the recognition of a duly established foreign corporation according to the rule of mutual recognition, nor beneficial tax treatment for the foreign corporation, but “window dressing” only. The requirement for application to the SIIC regime can be seen as discrimination against non-resident REITs, violating the freedoms violating EU law and putting France similar to its peers in the EU. Even though France does show evidence for “fit”, it does not provide evidence for integration, rather there is “misfit” of adaptational pressure. Therefore, the case study shows the process of Europeanization, but the EU has not impacted France as expected.

⁹⁷⁶ See Table V.2-1: Legal and Tax overview on the French SIIC regime.

⁹⁷⁷ See Chapter IV, Sec. 7.3 above.

3. The Bulgarian REIT – JSSPIC

Bulgaria represents a non-EU MS at the time of establishment of the REIT regime, but incorporated change to take the accession into account. Thus, Europeanization and European integration can be assessed. States in accession are open to the downloading of EU rules and “benchmarking” to transfer “best practices” and policies at domestic level. Bulgaria is a case of a State anticipating impulses from the EU by inducing bottom-up processes or “endogenising” Europe in domestic politics.

3.1 The new-MS case

Bulgaria’s real estate market has matured and grown very fast in the last decade following the changes of 1989. After the restitution of land title in the nineties commercial transactions of real estate property represent business as usual.⁹⁷⁸ Bulgaria signed the EU accession treaty in 2005 and joined in 2007. The accession has improved the economic environment, and real estate related investments have led to a significant development of the market.⁹⁷⁹ The Bulgarian government has learned that taxation is a key to foreign investments, and FDI is stimulated by a favourable fiscal policy, with real estate attracting FDI of EUR 2.15 billion.

That was recognised by the Bulgarian government when it introduced the JSSPIC regime through the Special Investment Purpose Companies Act (SPIC). A SPIC qualifies as REIT under Bulgarian law as a “Joint Stock Special Purpose Investment Company” (JSSPIC). FDI have not been seen in JSSPIC as a strong impact on Bulgaria’s real estate market. Of 314 listed companies 67 were JSSPICs in 2008, successful compared to other European REIT vehicles. The

⁹⁷⁸ Historically, in view of the legal approach to title over land, Bulgaria has been close to the ex-Soviet Union. Title over land and real estate was abolished after the 1950s. Afterwards, until the end of the 80s there was collectivisation and nationalisation where title had been moved to quasi-legal entities controlled by the government (versus the individual historical title-holders) or direct by the state.

⁹⁷⁹ Previously, the real estate market was characterised by low demand due to low access to credits, low income and limited opportunities for foreigners to involve actively in real estate investments. The number of real estate transactions for sales has risen from 121,552 in 2002 to 325,385 in 2007 (see bica (2008), p. 13).

number of JSSPICs in Bulgaria now has decreased today to 22⁹⁸⁰ representing Euro 319m market cap. The biggest JSSPIC are agricultural focused.⁹⁸¹

3.2 The JSSPIC regime

In introducing JSSPIC the regime wanted to promote and facilitate the purchase of private homes by foreign individuals and to provide room for domestic investors to buy-in the real estate market. Bulgaria wanted to present a modern and developed picture to the EU attractive for FDI from other MSs and individual investors. Analysis explores whether a MS new to the EU follows full compliancy or similar behaviourism with respect to tax sovereignty.

3.2.1 Legal Requirements (Legal form and Residency)

A company eligible for authorisation under the JSSPIC regime must be structured and operated as a special kind of domestic joint-stock company, the AD, including the denomination as JSSPIC. Different to the French SIIC, the JSSPIC must have its registered seat and place of effective management in Bulgaria. The JSSPIC provide for different conditions compared to its peers in the EU. Whereas, the European REITs limit corporate shareholdings to maximum of 30%, the Bulgarian regimes requires a minimum of 30% corporate shareholdings, with voting rights limited to maximum 5% per shareholding.

3.2.3 Tax treatment

The public limited company that complies with the legal requirements qualifies under the SPIC for licence to becoming a Bulgarian REIT, the JSSPIC, in order to benefit from the beneficial tax treatment. Licence can be obtained from the Bulgarian FSC subject to an application within six month as from its registration with the Commercial Register.⁹⁸²

⁹⁸⁰ As per 31 July 2012 (See EPRA (2013b), Bulgaria, Recital 1, p. 1).

⁹⁸¹ Traditional asset for JSSPICs is agricultural land. Every Bulgarian citizen is the owner of some small plots and for this reason for the ten to twenty years to come the market is expected to be active by the time the processes are regulated. JSSPICs specialised in farmland account for BGN 250mn of assets under management (AUM) almost 70% of the total AUM of the JSSPICs and its BGN 359mn of AUM.

⁹⁸² See EPRA (2013b), Bulgaria, Recital 2.1, p. 2.

Like it is key for REIT structures the JSSPIC as well is tax transparent at its level. Distributions to its shareholders are being taxed on their individual level depending on their legal personality. While the distribution received by the domestic corporate shareholder is tax-exempt those dividends distributed to individual shareholders shall be subject to taxation though. The resident individual shareholder faces a 5% domestic final withholding tax.⁹⁸³ By contrast the corporate foreign shareholder faces generally the same withholding tax at a rate of 5% as described above for the individual domestic shareholder unless the lower respective DTT withholding tax rate applies in favour for the corporate shareholder provided successful completion of the advanced procedure of the Tax and Social Security Code has been gained.⁹⁸⁴ Capital gains realised from the sale of JSSPIC shares are tax exempt for both, the corporate and the individual shareholder either foreign or domestic as long as the JSSPIC shares are listed at the stock exchange.⁹⁸⁵

Interestingly, foreign REITs invested in Bulgarian real estate are taxed differently to even to a foreign corporate shareholder not being involved in real estate business. The foreign REIT faces a 10% (!) withholding tax on its rental income from Bulgarian real property. As a consequence there neither for the corporate nor for the individual shareholder of the foreign REIT any tax privileges. As a result it is more disadvantageous for a foreign corporate i.e. a REIT to invest directly in real property in Bulgaria, rather investing in a Bulgarian REIT a JSSPIC.⁹⁸⁶

However, the situation differs in case of i.e. a foreign REIT investing in a Bulgarian company. In this case the foreign corporate shareholder receiving the

⁹⁸³ This applies equally for the non-resident individual shareholder too unless a lower rate is provided under a DTT which rate has been reduced as of January 1st, 2008 from 7% to 5%. This means that the majority of non-resident recipients of Bulgarian sourced dividends will not have to invoke DTT benefits. Treaty benefits are needed under the DTT's, which provide for a lower withholding tax rate on dividends which are the Austrian, Maltese and Kuwaiti (see Ernst & Young, (2008 BG).

⁹⁸⁴ According to the Bulgarian law, DTT provisions do not apply automatically. The beneficiary of the income needs to previously apply for permission to the Bulgarian revenue authorities to obtain tax relief, should the total income, subject to withholding taxes exceed BGN 100.000 (50.000 EUR). The deadline for the revenue authorities to issue their statement is two months as of the date of filing the application.

⁹⁸⁵ See EPRA (2013b), Bulgaria, Recital 4, p. 6/7.

⁹⁸⁶ See EPRA (2013b), Bulgaria, Recital 5, p. 7.

dividends is exempt from taxation provided it is a EU entity.⁹⁸⁷ Dividends paid by Bulgarian companies to entities resident in a MS, are exempt from Bulgarian source taxation, provided the following conditions are met:

1. the EU company owns at least 15% of the equity capital of the Bulgarian subsidiary;
2. for an uninterrupted period of at least 2 years; and
3. the EU parent as well as the Bulgarian subsidiary are subject to corporate income tax in their respective jurisdiction.⁹⁸⁸

The operative business of the JSSPIC, however, will be subject to the ordinary rules and taxation. Here, the acquisition of real estate triggers registration duties (i.e. transfer duties) at a rate of a range of 2% - 4% (RETT⁹⁸⁹) and a land registrar entrance fee of 0,1% are levied on the purchase price of the real estate. The purchase price may not be less than the tax value as defined by the tax authorities. The acquisition of shares, however, in the company owning the real estate is RETT free at the level of the acquirer. In kind contribution of real estate in the share capital of the JSSPIC is RETT exempt. Furthermore, the transfer of immovable property is subject to notary fee and land registry duty.⁹⁹⁰ In addition, the transfer may trigger VAT.⁹⁹¹

As a result the advantages of the JSSPIC are the tax free holding and sale of its shares that builds the attraction for shareholders to invest in still.

⁹⁸⁷ See EPRA (2013b), Bulgaria, Recital 4.2, p. 7.

⁹⁸⁸ The tax relief provision applies even when the two-year period has not lapsed at the date of dividend distribution, provided a collateral security is furnished to the revenue authority. The collateral must cover the full amount of the withholding tax due by means of a money deposit or a bank guarantee. The collateral is released upon fulfilment of the 2-year holding condition.

⁹⁸⁹ RETT = Real Estate Transfer Tax

⁹⁹⁰ Notary fees are capped to BGN 3.000 (i.e. EUR 1.500) while land registry duty is at 0,1% of the sale price.

⁹⁹¹ The sale of real estate is not VAT-able as long as land is concerned. However, plots included in construction plans etc. are VAT-able. With the VATA 2007 the government introduced a distinction between the VAT treatment of new (VAT-able) and old (option for Vatable treatment) buildings.

3.3 JSSPIC findings

The concept of the JSSPIC was planned to create a classical US-REIT comprising of typical features i.e. tax transparency and minimum distribution quotas. However, within the legislative process the government has given focus to the situation of the domestic real estate market that was not yet developed as such. Real property was cheap, however, identified as investment opportunity. Therefore, the JSSPIC provided a structure to assist the development of the real estate sector and promote Real Estate companies for going public. At the same time the government wanted to provide individuals with a mean to invest in real estate. The later, however, not on grounds known for i.e. the US in order to provide a means for pension schemes but to promote the domestic cultural situation of individuals buying their private homes rather renting them and by this securing the national situation before a buy-out by FDI.

General restrictions for Real Estate investments in Bulgaria with the accession to the EU has prevented the JSSPIC to become more successful with and used by FDI in Bulgaria. The Treaty for Accession of Bulgaria and Romania to the EU (EU Accession Treaty⁹⁹²) provides for a transitional period prior to direct application of the Freedom of Movement of Capital according to Sec 3 of Annex VI to the EU Accession Treaty.⁹⁹³ The EU Accession Treaty restrict the acquisition of land for second home by individuals, not being holder of a permanent resident permit, from the EU or the EEA⁹⁹⁴ for a period of 5 years until 2011 and of agricultural and forest land by legal persons for a period of 7 years until 2013.⁹⁹⁵ Though, foreign individuals and legal persons may be able to acquire title over buildings and limited “in-rem” rights over land in case of right to use and construction. The Bulgarian JSSPIC leaves flexibility to the shareholders with setting up the entity under the laws of Bulgaria or other MSs provided for the entity’ legal form is of a public limited company.⁹⁹⁶

⁹⁹² See Commission (2005).

⁹⁹³ See Commission (2005a), Section 3.

⁹⁹⁴ European Economic Area

⁹⁹⁵ See Commission (2005a), Section 3, para 2.

⁹⁹⁶ See Table V.3-1: Legal and Tax overview on the Bulgarian JSSPIC regime.

Table V.3-1: Legal and Tax overview on the Bulgarian JSSPIC regime

Requirement	Criteria	JSSPIC	European REITs*	Suspect*
Legal requirements	Legal form	Public limited company (AD) or any other domestic legal form on shares to be listed (acc to either MS corporate laws)	Corporation / Stock Company	yes
	Registered Seat	domestic	domestic	yes
	Listing	obligatory (either MS)	obligatory at regulated stock in either MS	no
	Shareholder Conditions corporate holdings shareholding by individuals free-float voting rights			yes
		min. 30%	max. 30%	
		n/A	min. 25 %	
		n/A	min. 25 %	
		max. 5% with single holdings	min. 25% by individuals	
			max. 50 by corporate	
Tax treatment (foreign REIT)	REIT regime option	not eligible	not eligible	yes
	Direct investment income tax capital gains tax	10% withholding tax on rental income	taxation according ordinary rules	yes
		taxation according ordinary rules	taxation according ordinary rules	yes
	Indirect investment	withholding tax, but exempt if dividends distributed to EU entity	max. 20% withholding tax	yes
* Model of "common understanding"				*SIIC violating EU law

Source: Original by W. Speckhahn

However, beside these flexible rules which look minded to comply with the freedoms of the Treaty this picture is, unfortunately, not valid though. The SPIC requires the JSSPIC to having its registered seat as well as its place of effective management to be located in Bulgaria only.⁹⁹⁷ Even though the entity may be established and listed in another MS to qualifying under the SPIC and being eligible to receiving license from the FSC the entity must, in this situation, transfer its residence to Bulgaria. In turn, it shall not be eligible to set up and license a JSSPIC and, afterwards, transfer the seat outside Bulgaria in another MS since this will lead to the possible loss of SPIC status for which meeting

⁹⁹⁷ Ibid.

ghee conditions under which it has been granted is required.⁹⁹⁸ Thus, the Bulgarian regime neither recognises the foreign REIT duly established in another MS nor qualifies foreign REITs eligible to opt for JSSPIC regime. In this case the ordinary corporate entity is subject to corporate tax in Bulgaria.

Viewed from the foreign perspective direct investments by neither individual nor corporate investors seem beneficial due to the application of the 10% withholding tax on the rental income from real property located in Bulgaria.⁹⁹⁹ Thus, a foreign REIT actively operating in Bulgaria may be advised not to invest in domestic real property directly. Rather, the foreign REIT shall invest indirectly in to domestic real property using a domestic resident entity receiving distributions made by the JSSPIC to the foreign REIT tax exempt¹⁰⁰⁰ provided the foreign REIT is an EU resident.¹⁰⁰¹ However, with respect to applicable EU law this alternative does require the foreign REIT to establish for an investment vehicle (SPV) under domestic law in order for the REIT to benefit from this tax treatment, but was not recognised itself as a duly established legal entity subject to equal treatment compared to resident corporations though. Thus, this mechanism is suspect of violating EU law still.¹⁰⁰²

It documents clearly, the SPIC is focussing to promote the domestic regime and, thus, the domestic real estate market only. This consequence is a hindrance to the freedom of establishment as well as to the freedom of movement of capital according to settled case law.¹⁰⁰³ Though, it is interesting that Bulgaria since its accession has not been subject to main proceedings before the ECJ in areas subject to this thesis as none of the cases subject to the analysis above referred to Bulgaria as Party though.¹⁰⁰⁴ Thus the JSSPIC is not a compliant regime with EU law rather suspect of violating the freedoms. Different of what might have been expected Bulgaria obviously focused more on assisting the domestic economy, rather anticipating impulses from the EU by inducing bottom-up

⁹⁹⁸ See EPRA (2013b), Bulgaria, Recital “Sanctions” 2.7, p. 4.

⁹⁹⁹ See Table V.3-1.

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ See Sec. 3.2.3 above.

¹⁰⁰² See Table V.3-1.

¹⁰⁰³ See Chapter IV., Sec. 3 ff. above.

¹⁰⁰⁴ See Chapter IV. above.

processes changing the European level or by “endogenising” Europe in domestic politics independent to specific pressures from the EU already though. Similar to the case of France, the JSSPIC is flexible in allowing for foreign legal forms for entity and its listing respectively on either regulated stock in the EU or EEA. However, the requirement for domestic residence is even more limiting. Thus, the regime appears suspect with its legal requirements and its tax treatment, thus, does not “fit” with EU law. With respect to the freedoms and ECJ case law, thus, as EU law stands to date, there is a high degree of adaptational pressure on the Bulgarian JSSPIC regime.

4. The Spanish REIT – SOCIMI

4.1 The recent introduction case

The Spanish real estate market is one of the most important and attractive markets for both domestic and foreign investors and its direct investments in real estate. Collective investment vehicles are already known in Spain and are extant by way of open-ended funds that serve as REIT-like regime. Apart from these collective vehicles Spain did not introduce a domestic REIT regime while other MSs already did. However, since the Spanish real estate market has been hit in 2008 by the crisis the Spanish government was about to assist the domestic real estate market and to incentivise investments in Spanish real estate, thus brought in to encourage investment into the property sector.¹⁰⁰⁵ Consequently, the Spanish ministry of economy presented in October 2008 the first draft legislation for the introduction of a REIT-Regime under the name “Sociedades Cotizadas de Inversión en el Mercado Inmobiliario” (SOCIMI). The SOCIMI Act was introduced finally in October 2009 with retroactive effect to 1

¹⁰⁰⁵ In the absence of a history for indirect investment vehicles for small investors like it use to be the case in i.e. Germany, France and the Netherlands providing open-end Funds the SOCIMI shall provide for such investment opportunity enabling the small investor to generate an income stream to realising steady profits. However, beside, there were 28 property companies listed in 2009 in Spain with a total market cap of E17bn. Spain's real estate market was estimated at €644bn, making it one of Europe's largest (see Zaidi (2009) and Meyer/Manzanares (2013), p. 99).

Jan. 2009.¹⁰⁰⁶ At this time Spain was the last “core” MS to the EU to establish its REIT regime.¹⁰⁰⁷

Though, the case of Spain provide for the case of a MS having established its REIT regime domestically only recently. Being one of the last joiners to the group of MSs providing for their own REIT regimes domestically, Spain shall be a representative example of a MS having absorbed “state-of-the-art” compliance with its regime though. Thus, Europeanization is present while Spain adapted EU legislation with the establishment of its SOCIMI regime already with the impact off the EU is proofed. However, since Spain has revised its domestic regime mainly with regard to its direct tax treatment recently in 2013 (negative) adaptational pressure from other MSs may have been involved representing a case of cross-loading. However, the acceptance and acknowledgement of EU law as the driver for a compliant REIT regime is rare though.

4.2 The SOCIMI regime

The SOCIMI Is a quoted property company that derives its income primarily from long-term investment in immovable property (real estate) distributes its income annually and, in general, does not pay income tax related to immovable property that is so distributed.¹⁰⁰⁸ Spain was best situated to have analysed the experiences the other MSs already made with its REIT regimes and, additionally, was able to take into consideration the relevant ECJ case law that

¹⁰⁰⁶ See Act 11/2009 governing the ‘Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario’ (the so-called ‘SOCIMI’). Since the government started discussions on the draft with market participants and on the political level the draft has been revised by the second draft of November 17th, 2008 and the third draft published on June 26th, 2009. The draft of November 2008 already included significant changes to the first draft and was accepted by the government already. However, the public discussions to the draft have led to further changes.

¹⁰⁰⁷ When introduced finally late in 2009 it was part of a multibillion-euro rescue plan included €3bn package to kick-start development and bank lending, that the government announced its plan for the SOCIMI to attract capital to Spanish real estate and increase liquidity in the sector. According to investors, the regime is mainly devised as a way to assist the banks with their overload of property. It was expected that banks are likely to place their residential assets that they have received from their borrowers the years before into SOCIMIs. Due to the crisis, though, there has been, unfortunately, in fact no establishment of a domestic REIT company and, consequently, there has been no development of a domestic REIT market to date though. (see PropertyWeekGlobal (2009), p. 6).

¹⁰⁰⁸ See Ley 11/2009, de 26 de octubre, por la que se regulan las Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario (“Ley”), Preamble, Sec. II, BOLETÍN OFICIAL DEL ESTADO, Nr 259, 27.10.2009, Sec. I, p. 89693.

has shaped especially the direct tax area though.¹⁰⁰⁹ Thus, the creation of a EU law compliant regime was possible. In this context the SOCIMI regime provides for an interesting case to the analysis in this chapter, thus, representing the third case study.

4.2.1 Legal Requirements

The qualifying legal form under the Spanish Corporate Law to establish a SOCIMI is a SA – Corporation (“Sociedades Anónimas”). The SA use to bear a minimum share capital of € 15m.¹⁰¹⁰ However, this requirement was reduced with the new legal tax system for SOCIMI published by the Spanish government in late 2012 to 5m only.¹⁰¹¹ The name of the company has to indicate the qualification of the company as being a REIT and the abbreviation of the corporate structure, i.e. “Sociedad Anónima Cotizada de Inversión en el Mercado Inmobiliario, Sociedad Anónima” or in short “SOCIMI, S.A.”.¹⁰¹²

The public limited company is entitled to apply for the SOCIMI regime only provided it being resident in Spain. There is, however, no express regulation in the Articles of the Ley dealing with the incorporation of the SOCIMI. However, the Ley is making specific reference to the Spanish Corporation Act¹⁰¹³ and, furthermore, it has to bear in mind that that the special tax regime is included in the Spanish Corporate Income Tax Act. This means, that in general terms, and not taking into account consideration made as regards the application of the principle of non-discrimination, the SOCIMI must be considered as a Spanish resident CIT taxpayer. According to the Spanish CIT in force, an entity will be considered a Spanish CIT taxpayer only, if it is qualified as tax resident in Spain, which in the framework of corporations is required to being set up under Spanish Corporate law or having its registered office and its central place of management in Spain. Consequently, even in the absence of any specific wording to the resident condition for the SOCIMI, such mentioning is not

¹⁰⁰⁹ See Chapter IV above.

¹⁰¹⁰ Ley Article 5 (1).

¹⁰¹¹ Such minimum share capital requirement was €15m under Law 11/2009, amendment to the Ley dated 20.12.2012 (see CliffordChance (2012), p.1).

¹⁰¹² See EPRA (2009), Spain, Recital 2.1, p. 2.

¹⁰¹³ See under Article 1 section 1 of Act 11/2009 with reference to the Corporation Act Royal Legislative Decree 1564/1989 currently called the Corporate Enterprise Act approved under the Royal Decree 1/2012 as the regulatory framework for SICIMI.

required because, among other conditions, the SOCIMI must be qualified as a Spanish taxpayer in order to receive the benefit of the application of this special tax regime. However, indirectly Article 8, which is about the application and access to the regime, refers to SOCIMIs resident in the Spanish territory though.¹⁰¹⁴

4.2.2 Tax treatment

As it is the case for the French SIIC as well, the Spanish SOCIMI regime is not about a special corporate form rather a special tax regime applicable to corporations that comply with certain conditions to qualify for license.¹⁰¹⁵ In order to benefit from the tax treatment designed for the SOCIMI the company may elect for the special tax regime. The special regime, however, will apply upon and as long as the SOCIMI undertakes qualifying activities and complies with the relevant conditions for the SOCIMI only.¹⁰¹⁶ However, after the application the requirements for the SOCIMI regime must be met in the following two years after the option for his tax regime is made but have then to be met each of its years of operation in the following.¹⁰¹⁷

At the start of the SOCIMI regime the tax treatment was different to the regimes of those in other MSs. Where the classical REIT provided for full transparency on the level of the REIT the Spanish SOCIMI-Regime, however, did not follow this concept. Contrary to its European peers the tax treatment of the SOCIMI provided for the taxation on its corporate level though. However, even the tax transparency at REIT level and deferral of tax treatment to the shareholder level was envisaged, in effect single rules of the regime where tax benefits shall be given have led to a different system of taxation a REIT level.¹⁰¹⁸ Even though,

¹⁰¹⁴ Ley Article 8.

¹⁰¹⁵ Conditions are outlined in Sec. 4.2.2. above as well as in Chapter III, Sec. 3 above.

¹⁰¹⁶ The transfer of a corporation to the SOCIMI regime as well as the set up of a SOCIMI, a share capital increase of a qualifying SOCIMI and the contribution of assets are generally tax exempt and do not trigger transfer taxation neither stamp duties (see Ley Articles 8 and 9). These changes, however, upon start of the operation and transfer tax at a rate between 6% and 7% as well as stamp duty at a rate between 0,5% and 2% are applicable for the purchase of assets by the SOCIMI. These taxes may be reduced by 95% where the SOCIMI acquires residential real estate for rental purposes.

¹⁰¹⁷ Ley Articles 1 and 8.

¹⁰¹⁸ See Meyer/Manzanares (2009), p. 847.

income derived from qualifying activities is taxed at a flat rate of 21%¹⁰¹⁹ in general under Corporate Income Tax (CIT) representing a lower taxation for SOCIMIs compared to corporate not having applied for the regime.¹⁰²⁰

Since the introduction, however, market participants questioned the regime. During a dialogue over the past years since inception the Spanish government enacted in late 2012 with the Amendment to the Ley the highly demanded transparent taxation of the SOCIMI setting the tax rate at SOCIMI level to 0%, thus, putting it on equal footing with the already existing regimes for REITs in other countries, notably in other MSs and transferring the taxation of profits to the shareholder upon distribution of the profits.¹⁰²¹ However, non-qualifying income will be taxed at a rate of 30% still if i.e. (i) the income derived from the letting of assets where the tenant was a related party according to Art. 16 of the CIT, (ii) the tenant is a resident of a tax haven for Spanish tax purposes or (iii) the income derived from transactions that do not trigger any income for the SOCIMI from an accounting standpoint.¹⁰²² As a reference to the basic idea for setting up the SOCIMI regime the tax treatment provides for a tax reduction if the portfolio of the SOCIMI consist of at least 50% of residential properties. In these cases the tax reduction will be 20% off the general taxation according the CIT that leads to a effective tax rate of 14,4% for qualifying income derived from residential property leasing.

Capital gains are being taxed according to the above rules accordingly that is in case they derive from qualifying investments at a rate of 19% whereas those from non-qualifying ones at a rate of 30%. It has, however, to be noted that any investments from investments that in general are qualifying will be taxed as non-qualifying ones if there is a non compliance to qualifying rules that are i.e. non-compliance with the minimum holding or maintenance period¹⁰²³, where the

¹⁰¹⁹ The rate, however, was 18% at start of the regime in 2009 but soon be expected that the tax flat rate is about to increase up to a rate of some 19 – 21% due to an increase of the tax rates on income and capital gains with the tax reform of the CIT by the Spanish government in 2010 which happened then later in 2010 actually.

¹⁰²⁰ See EPRA (2012). Spain. Recital 3.1, p. 4/5.

¹⁰²¹ See CliffordChance (2012), p. 1/2.

¹⁰²² See EPRA (2013b), Spain. Recital 3.1, p. 5.

¹⁰²³ The minimum holding period is of 3 years for real estate. This period may be reduced up to December 31, 2010 to 2 or just 1 year to the extent that the property has been rented or on the

purchaser is a related party according to Art. 16 of the CIT. The full tax rate applies as well when the transferee is a tax resident in a tax haven from a Spanish standpoint of view.¹⁰²⁴ The taxation of capital gains with the corporate shareholder still follows the general taxation rules for corporations and therefore will be in general at a rate of 30% as well. However, there are exemptions for portions, which correspond to non-distributed profits. There will be a tax credit granted at a rate according to which relevant profits have been taxed earlier already. In case of a taxation of retained earnings at a rate of 30% in case of the transfer of shares¹⁰²⁵ the credit will be at 30% as well. The individual shareholder will in general be subject to the taxation of capital gains as well. However, there can be a partial or even full exemption according to the income tax rules applicable for individual taxpayers that may or may not lead to gains taxed at personal tax rates applicable.¹⁰²⁶

In turn for the tax transparency of the SOCIMI itself its shareholders will be subject to taxation for dividends. Thus, the general exemption of dividends is cancelled for corporate shareholder as well as for domestic individuals.¹⁰²⁷ Both types of shareholders will be taxed according to ordinary rates under CIT though.¹⁰²⁸

Furthermore, there are no withholding taxes that apply with respect to the foreign shareholder. However, depending in the case of a foreign shareholder resident in a country with which there is no automatic exchange of information the dividends will be taxed at a rate of 21%.¹⁰²⁹ Furthermore there is a surcharge¹⁰³⁰ of 19% on dividends on the level of the SOCIMI in case

market for rent in the 5 or 10 years respectively prior to the date of election of the SOCIMI status.

¹⁰²⁴ See EPRA (2013b), Spain, Recital 3.1, p. 5.

¹⁰²⁵ Art. 30.5 CIT; See EPRA (2013b), Spain, Recital 4, p. 6/7.

¹⁰²⁶ If there is a calculated gain, this gain will be tax exempt according to the following formula: Exempt Capital Gain = (10% x CA x n° years) – dividends received. This holds true for the foreign shareholder as well but is subject to limits of Double Tax Treaties and its provisions with Spain. Where effective exchanges of information clauses are missing the taxation will be at a 19% tax rate.

¹⁰²⁷ Exemption remained at €1.500 only (see CliffordChance (2012), p. 2).

¹⁰²⁸ The ordinary tax rate for dividends is 30% under CIT.

¹⁰²⁹ See EPRA (2013b), Spain, Recital 5, p. 8.

¹⁰³⁰ The surcharge were introduced with recent amendments by Act 11/2009, through Act 16/2012, the Spanish government has set up a special 19% surcharge that will be imposed on

distribution shall be to a shareholder owning a share equal or more than 5% of the capital stock or where the shareholder is resident in a tax haven which applicable tax rate is less than 10% on the distributed dividends. The latter, however, shall not be applicable for any MSs though. Where and when the surcharge was imposed at the level of the SOCIMI on dividend distributions, no (further) withholding tax is applicable.¹⁰³¹ Interestingly, there is exception in case the dividend is paid to another REIT with a 100% distribution policy.¹⁰³² The question, however, whether this applies for the benefit of domestic SOCIMI-REITs only or may be called by foreign REITs as shareholder in a SOCIMI as well can be left open. It is likely the Spanish subsidiary established as a SOCIMI where its Mother-company is a Spanish corporate though. Otherwise there will be no distribution of 100% of the profits as i.e. in the case of a dominations and profit transfer agreement. A foreign REIT, however, in case being the shareholder directly in the SOCIMI is not legally and will not effectively by distribution policy distribute its profits at a rate of 100% to its shareholders though as this will likely harm its financial situation though.

4.3 SOCIMI findings

The SOCIMI regime is in its legal requirements and tax treatment comparable with other MSs regimes, thus follows generally the classical “flow-through” concept. Like other, the SOCIMI regime is a pure tax regime, which is open for any company using a legal form that allows for listing of its shares like a joint stock company. Furthermore, the SOCIMI must be resident in Spain in order to qualify as a resident taxpayer under Spanish tax law and as a pre-condition to apply for license. Thus, it seems there is in general access for any foreign company i.e. a foreign REIT to the SOCIMI regime. In this respect the SOCIMI follows the same concepts with its legal requirements as France does with the

SOCIMI dividend distributions. The reason why this special surcharge has been introduced as an amendment is because, under the new special tax regime, qualified SOCIMIs are taxed at 0% CIT rate in order to avoid the absence of an final taxation at the level of the final shareholder (at least 10% of the dividend received). The Spanish government has considered the inclusion of this special 19% surcharge.

¹⁰³¹ On the other hand, the Parent-Subsidiary-Directive will be applicable on dividend distributions in the event of a qualified entity foreign shareholder (entities included in the attached Directive list) when dividend distributed was subject to the special 19% tax rate at the level of the SOCIMI.

¹⁰³² See EPRA (2014), p. 43.

SIIC regime providing for a regime that does not seem suspect, rather “fit” to EU law requirements.

Table V.4-1: Legal and Tax overview on the Spanish SOCIMI regime

Requirement	Criteria	JSSPIC	European REITs*	Suspect*
Legal requirements	Legal form	public limited company (SA)	Corporation / Stock Company	no
	Registered Seat	Domestic or either EU MS	domestic	no
	Listing	obligatory (either regulated stock EU/EEA)	obligatory at regulated stock in either MS	no
	Shareholder Conditions			yes
	corporate holdings	n/A	max. 30%	
	shareholding by individuals	n/A	min. 25 %	
	free-float	min. 25% (at MAB ¹⁰³³ less than 5% possible)	min. 25 %	
	voting rights	n/A	min. 25% by individuals	
Tax treatment (foreign REIT)			max. 50 by corporate	
	REIT regime option	not eligible	not eligible	yes
	Direct investment			
	income tax	ordinary tax treatment for non-resident corporate	taxation according ordinary rules	yes
	capital gains tax	taxation according ordinary rules	taxation according ordinary rules	yes
	Indirect investment	0% tax provided subject to tax in country of residence at a tax rate of min. 10%, otherwise 21% withholding tax, but tax credit in DTT case possible	max. 20% withholding tax	yes
* Model of “common understanding”				*SIIC violating EU law

Source: Original by W. Speckhahn

However, conditional for access is the foreign REIT providing at least for a PE with which it operates in Spain in order to comply with the domestic residence requirement though.¹⁰³⁴ In the absence of specific provision for the requirements to be met in order to qualify for application to the regime (equivalence test) in

¹⁰³³ MAB = Mercado Alternativo Bursatil (see EPRA (2014), p. 42).

¹⁰³⁴ See EPRA (2013b), Spain, p. 6 and 9 and Table V.4-1: Legal and Tax overview on the Spanish SOCIMI regime.

Act 11/2009 of 26 October as well as its recent amendments introduced Act 16/2012 of 27 December which clearly determine the key elements to consider for foreign REITs as equivalent to the SOCIMI will be to a high degree of uncertainty.¹⁰³⁵

Furthermore, even though limited to seek for SOCIMI status there are shareholder conditions to meet still. The conditions, however, are marginal only in case of listing at the MAB resulting possibly into no free-float effectively. Nevertheless, this condition is suspect while setting a requirement in addition to what is required under the rule of mutual recognition though.

Since the tax rate was set to 0% recently in late 2012, setting the SOCIMI at a transparent level in tax terms Spain provide for different treatment at shareholder level too.¹⁰³⁶ Distributions by the SOCIMI to its shareholders are subject to withholding tax, whereas, distributions to the resident shareholder are not.¹⁰³⁷ The non-resident corporate shareholders could be eligible under the EU Parent-Subsidiary Directive and a relevant DTT, provided that the relevant conditions are met only.¹⁰³⁸ Furthermore, any profit from direct investment by the foreign REIT is subject to ordinary taxation for non-resident corporate.¹⁰³⁹ Thus, the SOCIMI regime is now suspect to violate the freedoms as the other case studies subject to this analysis too. This is an interesting development within the European REIT universe. At the time of its establishment the SOCIMI regime was not transparent at the REIT level, rather was to treat all shareholders equally and taxed dividend payments to shareholders, irrelevant of its residence. This concept, thus, ought to be the first and only EU law compliant

¹⁰³⁵ In the Absence of specific provisions in Spanish law it will, in this context, be subject to apply for a binding resolution before the Spanish tax authorities in order to get consistent equivalence criteria on a case by case analysis. Therefore, EPRA (2013b), Spain, Recital 5, p. 8 refers to a case-by-case evaluation since the bases for the analysis are not defined in the laws yet.

¹⁰³⁶ See Table V.4-1: Legal and Tax overview on the Spanish SOCIMI regime.

¹⁰³⁷ Ibid. Different opinion provided by Meyer/Manzanares (2013), p. 100.

¹⁰³⁸ See EPRA (2013b), Spain, Recital 4.2, p. 8.

¹⁰³⁹ Ibid. Generally the same situation is found for the taxation of capital gains. As outlined above, capital gains are not fully tax exempt. However, they are being calculated according to Personal Income Tax Act rules. This regime is applicable not only for Spanish resident individuals rather for foreign shareholders too. This position was then confirmed by the ECJ recently where it decided that a Spanish capital gains tax which is less favourable to shares quoted on a foreign stock exchange as opposed to shares quoted on a Spanish exchange is not in line with the free movement of services and capital (see Case C-219/03, "Commission v Spain"). Following the decision of the ECJ Spain was to change its regime.

regime though. It seems for this reason that there cannot be account for any case subject to proceedings analysed above¹⁰⁴⁰ having Spain been Party to. Unfortunately, due to the so-called financial crisis has offset Spain from the radar of international investors, whereas the tax treatment at REIT level was of no interest for resident Spanish investors though. The revised regime to a fully transparent flow-through regime has set pace for the SOCIMI success becoming a desirable investment vehicle in Spain.¹⁰⁴¹ However, the regime is now set at the same footing with its European Peers, thus, there is “misfit” to EU law and pressure on Spain to adapt its requirements though.

5. Case Study findings

This chapter concludes that REIT regimes in MSs are suspect of being incompatible with EU law and its freedoms in different ways. Suspect regulations are found in the legal requirements for qualifying entities excluding foreign resident REITs. Not only the different treatment at shareholder level but the inherent differentiation made between resident and non-resident shareholder is of issue being taxed as an ordinary foreign corporate or shareholder. Where, however, simply due to the origin a foreign REIT does not benefit from a domestic REIT regime, clear discrimination on grounds of nationality exists.

Awareness for EU law does not seem to be highly developed in MSs that have not undergone the EU compliance test. Since in the past MSs have given no or only little attention to potential incompatibilities of its regimes with Community law the focus has recently changed. MSs fear of abuse of its tax regimes and loss of tax base is the key driver in setting up its tax treatment of the (foreign) REIT regime. The UK and Germany have given focus to the taxation of foreign investors i.e. shareholders in its domestic REITs, being well aware of the “dilemma”.¹⁰⁴² The regimes are suspect of violating the freedoms under the Treaty. Going forward, the risk for MSs imposing withholding tax non-compliant with the Treaty is to loosing its right to imposing withholding tax on distributions

¹⁰⁴⁰ See Chapter IV. above.

¹⁰⁴¹ See Serrano de Haro/Fernandez (2014), p. 14/15, PropertyEU (2014).

¹⁰⁴² See Cornelisse (2006 Part 1), recital 3.3., p. 8 with further reference to the local discussions and papers i.e. for the UK: HMT (2005), p. 12, para 4.4; for Germany: EBS (2005).

to foreign shareholders and the right to levy income tax on property income realised by a foreign REIT. Hence, MSs will not be of control of their domestic tax revenue, thus, find themselves captured in the situation that they wanted to prevent that is the fear of tax revenue loss. This general conclusion is fuelled by the results of the case studies too. Differential treatment of domestic and cross-border situations starts with the legal requirements already. Interestingly, the MSs regimes subject to the case studies have a similar approach, which, according to the analysis above, is represented by the majority of the REIT regimes extant in MSs though.

Table V.5-1: Case Study findings – overview

Case Study Findings					
Criteria	Suspect	SIIC	JSSPIC	SOCIMI	Suspect
Legal requirements	Case Study	France	Bulgaria	Spain	common understanding
Legal form	yes	SA, SCA or any legal form on shares, incl foreign	Public limited company (AD) (either MS corporate laws)	Public limited company (SA)	yes
Registered Seat	yes	domestic (either MS)	domestic	domestic (either MS)	yes
Listing	no	obligatory (either MS)	obligatory (either MS)	obligatory (either regulated stock EU/EEA)	no
Shareholder Conditions	yes				yes
corporate holdings		max. 60% single	min. 30%	n/A	
shareholding by individuals		max. 60% single	n/A	n/A	
free-float		min. 15% with each less 2% voting rights	n/A	min. 25% (at MAB ¹⁰⁴³ less than 5% possible)	
voting rights		See free-float	max. 5% with single holdings	n/A	
Tax treatment (foreign REIT)					
REIT regime option	yes	election for SIIC regime possible	not eligible	not eligible	yes

¹⁰⁴³ The SOCIMI can be listed on either the main board of the Madrid Stock Exchange (XMAD) or the Mercado Alternativo Bursatil (MAB) (see EPRA (2014), p. 42).

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Direct investments					
income tax	yes	taxation according ordinary rules	10% withholding tax on rental income	ordinary tax treatment for non-resident corporate	yes
capital gains tax	yes	taxation according ordinary rules	taxation according ordinary rules	taxation according ordinary rules	yes
Indirect investment	yes	25% withholding tax, but may be reduced under DTT to 15%	withholding tax, but exempt if dividends distributed to EU entity	21% withholding tax, but tax credit in DTT case possible	yes

Source: Original by W. Speckhahn

All regimes subject to the case study are with their legal requirements generally well in compliance with EU law and settled case law though. The free movement of corporate in inbound cases where foreign Corporate and REITs moving-in without the application of any pre-conditional rules¹⁰⁴⁴ is well recognised as well as their respective legal form since lawfully established in its Home State.¹⁰⁴⁵ Hereunder, especially with the SIIC and SOCIMI regimes a well established understanding of the case law with respect to the recognition of incoming corporate and its respective legal form.¹⁰⁴⁶ This holds true with a view to the residency requirement where a flexible approach allowing for residence domestic or either MS.¹⁰⁴⁷ However, this pure formal view does not reflect reality properly. Rather, the formal situation is “window dressing” only, since this formal situation is countered with the requirements set to meeting the conditions for domestic regime in full. These requirements, however, include inter alia to meeting the requirements under domestic tax laws, which in the case of especially those regimes reflecting pure tax regimes only, like the SIIC and SOCIMI. Hereunder, the foreign REIT is to provide for a taxable entity under domestic law, which in effect, requires the foreign to setting up for a SPV under domestic law though. Thus, the foreign REIT is de facto not recognised equally

¹⁰⁴⁴ See as required by the ECJ with its Case “Dassonville” (Chapter IV, Sec. 3.1 above).

¹⁰⁴⁵ See as required by the ECJ with its Cases “Cassis de Dijon” and “Avoir fiscal” (Chapter IV, Sec. 3.2 and 3.3 above).

¹⁰⁴⁶ See Sec. 3.2.2 above and as required by the ECJ with its Cases “Centros”, “Überseering” and “Inspire Art” (Chapter IV, Sec. 4, 5 and 7 above).

¹⁰⁴⁷ See Table V.5-1.

to a domestic corporation and, thus, the legal requirements do not respect the freedoms though. Additionally, there are shareholder conditions to meet, which require additional or different conditions. Where the foreign REIT is to meet these conditions may require a change of structure or even the legal form. Therefore, as a *facit* it can be concluded that the regimes in the MSs subject to the case study are in “misfit” with EU law though.

Whereas, the JSSPIC regime require the domestic REIT company to having its seat domestically as a condition for becoming a domestic taxpayer under its tax laws to qualifying to apply for REIT status.¹⁰⁴⁸ This lead to either a transfer of the company’ seat into Bulgaria in case a foreign corporate seeks for REIT status. This obviously constitute a limitation to apply for the respective domestic REIT regime, thus, is a hindrance to the freedom of establishment as well as the freedom of movement of capital. Hereto, the ECJ clearly outlined that there shall, however, be no difference in treatment between a resident versus a non-resident¹⁰⁴⁹ as well as where a foreign entity is comparable in its *essentialia* to domestic ones it shall be treated as a domestic entity though.

As regards the legal requirements the regimes analysed in the case studies it can be concluded that the SIIC and the SOCIMI regime only seem to fully comply with the framework set by EU law, whereas the JSSPIC is suspect with regard to its requirement for residency, thus, clearly being contrary to what has been stated by settled case law already.¹⁰⁵⁰ This is the more interesting since especially Bulgaria shall have this already taken into consideration while designing their respective regimes. However, it seem that national interests, especially with a view to the critical situation of the Spanish economy and setting incentives to stimulate it has been of focus rather compliance with EU law though.

Different picture, though, is shown by the case studies with regards to the respective tax treatments. Whereas, the treatment for the domestic REIT is not

¹⁰⁴⁸ Ibid.

¹⁰⁴⁹ See Cases “Schumacker” and “Stauffer”(Chapter IV, Sec. 5.2, 5.2.2 and 5.3.1(7) above).

¹⁰⁵⁰ See Table V.5-1.

suspect of infringing EU law, the case is different for the foreign REIT operating in the Host State though, the case for the foreign REIT operating in the Host State proofed to be suspect though. There is, however, no difference whether the foreign REIT is operating directly or indirectly via a shareholding in a domestic REIT. In the case of direct investments in the Host State the foreign REIT shall be treated under the domestic REIT regime. Even though all regimes subject to the case studies provided for lenient conditions towards the legal requirements, this is different with access to REIT status. Common to all regimes is the fact that they do not represent a specific legal form of a corporate under the respective domestic corporate laws rather all regimes represent a special tax regime eligible for those companies complying with certain conditions, the REIT regime requirements under the respective domestic REIT regime and its laws. Thus, all regimes require a company domestically to elect for application to get access to the advantageous i.e. the beneficial tax treatment. Even though access to the regime seem possible for foreign companies as well by just applying for REIT status, in fact that is not possible as such. To this point there is no difference in between the group subject to the case studies. Whereas the regimes generally do not require domestic residence this is, however, not sufficient for getting access to domestic REIT status though. With all other MSs as well the foreign company applying for access to the domestic regime for its activities in the Host State must provide at least for a qualifying subsidiary, i.e. a PE, which is subject to corporate income tax in the Host State, either due to their legal form or tax election.¹⁰⁵¹ The very approach is taken for applying to the SOCIMI regime and for getting licensed under the JSSPIC regime too. However, Bulgaria and Spain have made it clearer in their regime outlining that as a condition for getting access to the regime the company applying must be a resident taxpayer under its respective CIT though.

However, this approach does not seem to be compliant in light of the applicable EU law and settled case law by the ECJ. Taking the principle of non-discrimination as well as the freedom of establishment any foreign REIT once legally established in a MS und the Home State laws must be recognised in any other MS. Therefore, where a MS, such as those of the case study group,

¹⁰⁵¹ See i.e. for France EPRA (2013b), France, Recital 2.2, p. 3.

provide for a domestic REIT regime domestically shall grant access to their domestic regime to foreign established REITs though.¹⁰⁵² Notwithstanding the above statement, it holds true that discrimination arise in the event that the domestic regime was not granted to an REIT established according to the regime and laws of another MS rather, in addition, which fulfils all and every legal requirement under the domestic regime (i.e. legal requirements, operating activities and Status). Consequently, the regimes require the foreign REIT, in addition to being established as REIT under its Home State REIT regime, to fulfil all requirements for the equivalence test which by content differs meaning that the foreign REIT qualifies under the domestic REIT regime to apply for its status only when meeting all and every requirement of the domestic regime though. In the absence of a specific regulation containing the key elements for such a equivalence test it is to understand that in very limited and restrictive cases only a foreign REIT established under the regime of another MS could claim for the application of the principle of non-discrimination successfully. Thus, the requirement, not necessarily express but in fact, by a domestic regime for the fulfilment of an equivalence test is suspect of violating EU law.

Furthermore, suspect elements become most obvious to distributions. Dividends paid to the non-resident shareholder are subject to dividend withholding tax in case of the JSSIPIC and ordinary corporate tax rules in case of the SIIC and SOCIMI respectively, whereas there is an exemption if the dividends paid to a resident shareholder though.¹⁰⁵³ It is remarkable to see that i.e. the SIIC regime was introduced in 2003 with little regard being paid to the tax position of foreign shareholders and the impact of EU law. Today, several non-French quoted REITs are benefiting from the SIIC regime in connection with their portfolios of French properties. Property income of French subsidiaries, benefiting from the SIIC regime are flowing to the foreign EU parent companies/REITs, free of any French tax, as the French tax authorities have accepted opening up the SIIC regime to foreign companies that meet the conditions for the SIIC status. Moreover, it is most likely that France cannot impose withholding tax on

¹⁰⁵² See Cases “Cassis de Dijon” and “Stauffer” (Chapter IV, Sec. 3.2. and 5.3.1(7) above).

¹⁰⁵³ See Table V.5-1.

dividends distributed by a French resident SIIC, as France does not impose a withholding tax on domestic dividends.¹⁰⁵⁴

The most important difference of the SOCIMI regime when it started in 2009 has been the different tax regime applicable. Originally, the Spanish government did not to leave the SOCIMI tax transparent on its level but established a regime that was to tax any income and profits to be distributed to its shareholder at the SOCIMI level already. Even though the tax rate at SOCIMI level was considered to be a special rate not representing the ordinary rate to tax on ordinary corporate' income under Spanish CIT.¹⁰⁵⁵ Rather, the rate from start represented a reduced 19% flat rate though. In case of meeting the Asset test that is 50% of the income is originated from residential real estate a further 20% exemption on that portion of income is eligible for the SOCIMI possibly bringing its tax rate further down to effectively 15.2%.¹⁰⁵⁶ This tax was the final tax for residents as well as for non-resident taxpayers and shareholders of the SOCIMI as generally none of them were taxed on dividends and capital gains derived from their investment in a SOCIMI.

This concept represented a different understanding of the REIT in Spain and compared to other MSs having established its REIT regimes. One of the key elements of a REIT is the tax transparency at the company level, which transfers the taxation of the income of the REIT to the hands of the Shareholders where tax is paid according to the individual tax rate. In deciding differently the Spanish REIT was the only one to tax the income at company level already. Obviously, the success of the SOCIMI regime lacked behind the expectations of the government as market participants in Spain started to question this tax regime for the SOCIMI already. In fact, until today, there is no SOCIMI extant, which according to market observers is owed to the non-transparent nature of the SOCIMI only.¹⁰⁵⁷ Finally, in December 2012 the government amended the regime significantly in this respect introducing a 0%

¹⁰⁵⁴ This holds true except in case where the Parent-Subsidiary-Directive applies. However, as the foreign REIT is a tax exempt entity the Directive is not applicable though (see Case "Denkavit" and Cornelisse (2006 Part 1), recital 3.2, p. 8).

¹⁰⁵⁵ The ordinary tax rate in Spain on corporate income is 30% according CIT.

¹⁰⁵⁶ See EPRA (2013b), Spain, Recital 3.1, p. 4 et seq.

¹⁰⁵⁷ See i.e. Zaidi (2009) and CliffordChance (2012), p.1/2.

taxation of the SOCIMI though.¹⁰⁵⁸ The elimination of the taxation of profits at REIT level transformed the regime from a taxed into a transparent regime though.

With this change the SOCIMI was put “on equal footing”¹⁰⁵⁹ with the already existing REIT regimes in the EU, it changed its situation towards EU law as well. The issues in taxation identified of being suspect with regard to EU compliance are generally the rules dealing with the taxation of the non-resident shareholder. Where the REIT is fully transparent the taxation of profits must be secured through the taxation of such profits in the hand of the shareholder. In case of a non-resident shareholder the dividend payment is made outside the country, thus, those funds are not subject to tax in the territory of the originating country. Consequently, prior to making the payment withholding taxes are levied on those distributions securing for the taxation of the distributions and, more importantly, securing the tax revenue for the MSs. This is the usual concept followed by MSs and its REIT regimes though. However, as analysed, such treatment with a view to the non-resident shareholder is suspect of violating the Freedoms of the Treaty, thus, EU law since the distribution to the resident shareholder is not burdened with tax rather is taxed according to individual situations that may or may not even lead to a zero taxation of such dividend payments. In contrast, the non-resident shareholder may set himself into a comparable situation in its country of residence only if the Home State grants a tax credit for the withholding tax paid or has concluded a DTT with the country of source whereby the same result applies. This is, unfortunately, not the case generally.¹⁰⁶⁰

In this situation an obvious solution is the taxation of profits at REIT level, thus, treating resident and non-resident shareholders equally and leaving the taxation to a true effect in the hands of any shareholder, irrelevant of its residency, at its personal tax situation. Moreover, the country taxing these profits firstly has secured its tax revenue from the activities in its territory and may secondly has

¹⁰⁵⁸ See Sec. 4.2.3 above.

¹⁰⁵⁹ See CliffordChance (2012), p.1.

¹⁰⁶⁰ See Chapter II and this Chapter above.

to proceed or compensate those to another country subject to a DTT. But anyway, the main point is to having secured for domestic tax revenue in a way of equal treatment of persons (whether individuals or legal persons) though. In this respect the original SOCIMI regime was to the most extent possible in compliance with EU law and its Freedoms. This created a special case with the SOCIMI until Spain amended the regime to the 0% taxation. Based on the amendment Spain sets itself in the same suspect situation with other MSs regimes though.

In the case of indirect investment the foreign REIT does not benefit from the domestic REIT regime either. Whereas the taxation of dividends distributed to the foreign shareholder of the domestic REIT is not subject to withholding tax, even by different means applicable, it is however open for further deduction according to a DTT applicable. However, the reduction under a DTT usually will be by 15% off that there is effectively a tax leakage of 6 – 10% under the SOCIMI and the SIIC regime respectively though. Interestingly, this is different under the JSSPIC regime under which withholding tax does not apply where dividends are distributed to an EU entity.

Notwithstanding, concerning withholding taxation there are suspect rules within domestic tax regimes though since not all of the possible situations provide for clear EU compliancy. There is clear different fiscal treatment compared to the domestic case leading to discrimination of the non-resident case, which is violating the freedoms though.¹⁰⁶¹ In between MSs REIT regimes, however, almost all of them follow a tax transparent approach on REIT level but there is no such common understanding existing towards the taxation of foreign investors. The differences are mostly being motivated by countries fear of abuse in terms of tax evasion. Herewith, the impact of the EU seem to be limited to downloading of “hard” law, but transformation in to the national laws is limited to cases of direct applicability such as in the case a MS is subject to judicial proceedings i.e. Party of a lawsuit pending before the ECJ. Decisions from the ECJ in these situations seem to be implemented and, as it was seen, lead to adjustments in domestic regimes accordingly. Beyond these proceedings and its

¹⁰⁶¹ See Cases “Commerzbank” and “Saint Gobain” (Chapter IV, Sec. 5.3.1 (3) and (4) above).

Parties involved, however, there is no such implementation of EU law and respective adjustment of domestic regimes though. Rather, there seem to exist kind of cross-loading in between the MSs and its regimes creating a “common understanding”, which, however, is suspect of violation of EU law, whereas any kind of adaptational pressure does exist legally, but seem not to urge MSs to adjust domestic laws accordingly. However, “key” for further global growth and spread for REITs in MSs is to achieve a harmonisation of rules that will foster the growth of a European REIT ‘brand’ and encourage cross-border investment from one MS to another.

6. Conclusion

Thus, the regimes subject to the case studies are suspect, even though partly, to being in conflict with EU law, thus, being suspect of violating the freedoms.¹⁰⁶² The impact of the EU on domestic regimes has not resulted in “fit” to all extant MSs REIT regimes. The case studies do not differ with the overall assessment of “fit”, towards the “common understanding” between all MSs providing domestic REIT regimes. Thus, “misfit” has brought forward adaptational pressure to adjust their regimes accordingly. The case study findings confirm that the fear of loss of tax revenue is the main driver for MSs to keep their eye on sovereignty and hinder to seek for solutions, which then are cross-loaded to other MSs and uploaded to the level of the EU. Thus, the process of Europeanization has not resulted in integration, and seems to require assistance from the EU to harmonise. Activities from the EU shall be discussed in the following chapter to explore the process of Europeanization towards a possible harmonisation of REITs towards a EuroREIT regime with “fit” with EU “hard” law.

¹⁰⁶² See Table V.5-1: Case Study findings – overview.

Chapter VI: EU “Soft” Policies and the “EuroREIT”

1. Objectives for this Chapter

To identify evidence of Europeanization, distinction in this thesis is made between directly applicable policies with which MSs REIT regimes have to comply, so-called “hard” policies and laws, covered in the previous chapters, and policy suggestions and ideas promoted by the EU, so-called “soft” activities and proposals. This chapter addresses policy, which the EU attempts to influence, but the final say reside with the MSs. This process explains the interaction of MSs and EU institutions producing change on domestic level.¹¹⁶⁸ ECJ case law has struck down barriers to the freedoms,¹¹⁶⁹ and Europeanization in the implementation of EU law and the change on domestic level¹¹⁷⁰ from competition to “shared beliefs”¹¹⁷¹, is seen by vertical mechanisms such as adaptational pressure on MSs to adapt their domestic rules.¹¹⁷² This may not directly lead to harmonised REIT regimes, but may be “... uploaded (by MSs to EU institutions) and following European integration downloaded ...” to the MSs.¹¹⁷³ Hence, Europeanization becomes European integration;¹¹⁷⁴ “negative integration connects to positive integration”.¹¹⁷⁵ Without discussing the process of Europeanization in detail, the different actors and their interaction, insight for MSs REIT regimes coming to a harmonised REIT regime on EU level will be analysed.¹¹⁷⁶

ECJ cases are taken into consideration with its implied normative power influencing activities by the Commission towards harmonising MSs tax regimes.

¹¹⁶⁸ See Radaelli (2006), p. 59 with reference to Gualini (2003), p. 152, and the idea of Europeanization as “*explanandum*”.

¹¹⁶⁹ See Radaelli (2006), p. 70, Harcourt (2003), p. 179(200).

¹¹⁷⁰ See Howell (2004), p. 42 with reference to Dyson/Goetz (2002).

¹¹⁷¹ See Howell (2004), p. 44, 158.

¹¹⁷² Ibid, See Case “Schumacker” and the trilogy of cases “Centros”, “Überseering” and “Inspire Art” (see Chapter IV above).

¹¹⁷³ See Howell (2004), p. 46, 48 referring to this process as “cross loading” (EN3).

¹¹⁷⁴ See Howell (2004), p. 151; See Caporaso (2007), p. 28 et seqq. on the “three-step model” to the process of integration, see Figure 2.1 “Europeanization and domestic change”, p. 28.

¹¹⁷⁵ Sweet (2002), p. 8.

¹¹⁷⁶ See Howell (2004), p. 176; See for details to the discussion on Europeanization in i.e.: Featherstone/Radaelli (2003), Howell (2004), Radaelli (2006) and Graziano/Vink (2007).

In the absence of a EU mandate where national governments control the process “facilitated coordination”¹¹⁷⁷ helps MSs to engage and direct policy promotion and diffusion by themselves. Resulting from “soft” policies toward harmonising tax treatment in MSs REIT regimes examples can be found of “cross-loading” between MSs using concepts from Directives already and uploading MSs ideas and policies to the EU.

Thus, the “common understanding” within REIT regimes shall be taken further as a concept-building basis for a EuroREIT and possible solutions for its direct tax regime. The harmonisation of REIT regimes in the EU towards a EuroREIT requires assistance from the EU and MSs as well, which this chapter addresses by

- examining mechanisms for change at EU level in the area of corporate (direct) tax through “facilitated coordination”;
- providing solution to overcome MSs fear of loss of tax base and helping the achievement of a harmonised REIT model;
- formulating an approach toward a European REIT “fit” with EU law; and
- understanding the likelihood of a EuroREIT regime through the process of Europeanization.

2. EU “soft” policies

It became clear to the Commission that vested interests in MSs were hindering mutual understanding according to the Treaty.¹¹⁷⁸ As the MSs came closer to a mutual understanding of an internal market national rules come to be replaced by Community rules.¹¹⁷⁹ As local tax systems have been more under attack from ECJ decisions¹¹⁸⁰ MSs may move towards a tax harmonisation.

In this context EU “soft” policies shall be discussed and suggestions for best practise provided towards the harmonisation of European REIT regimes. The

¹¹⁷⁷ See Bulmer/Radaelli (2005).

¹¹⁷⁸ See Fairhurst/Vincasi (2003), p. 420.

¹¹⁷⁹ See Weatherill (1995), p. 226.

¹¹⁸⁰ See Persoff (2004), p. 6.

EU acts as a “policy entrepreneur”¹¹⁸¹ for so-called “soft” law or non-binding forms of regulation such as recommendations, declarations and resolutions, leaving the MSs to set the agenda.¹¹⁸² Policy learning is the expected or desired outcome of these endeavours.¹¹⁸³ The process is known as the Open Method of Coordination (OMC), a policy transfer platform for diffusion of “soft” policies, termed by Bulmer and Radaelli “facilitated coordination”.¹¹⁸⁴

2.1 Harmonisation v Mutual recognition

The Commission does not advocate “full EU company tax harmonisation”, rather seeking to promote a single tax base for companies, stressing that the level of tax rates is a matter for MSs.¹¹⁸⁵ Assisting the harmonisation of laws and REIT regimes will depend upon the success of the harmonisation of MSs different tax treatment. Where the tax treatment is equally applied to resident and non-resident taxable individuals and companies, any legal requirements suspect of being discriminatory may build ground to argue for different treatment. Since the real-seat principle has been *de-facto* dismissed by the ECJ¹¹⁸⁶ there is no reason for any REITs to establish according to the domestic regime and its company laws. As long as any REIT legally established under an MS’ REIT regime is recognised as “REIT” by another MS in which the REIT has “moved” single operational activities, the legal requirements set by the MS of its incorporation are guiding only whether the requirement is a specific legal form for company, conditional listing and the location of the stock exchange or shareholder requirements. It provides the moving-in REIT to be treated under the domestic REIT regime and its beneficial treatment.

Settled case law provides for MSs to mutually recognise a duly established REIT under the regime of one MS.¹¹⁸⁷ Harmonisation requires acceptance of MSs to acknowledge decisions by the ECJ without being Party to the main proceedings, assessing its national rules and transferring the rulings outcome

¹¹⁸¹ See Ladrech (2010), p. 169.

¹¹⁸² See Radaelli (2005).

¹¹⁸³ See Ladrech (2010), p. 182.

¹¹⁸⁴ See Bulmer/Radaelli (2005).

¹¹⁸⁵ See MEMO/03/237 of November 25 2003.

¹¹⁸⁶ See Chapter IV, Section 4.1 above.

¹¹⁸⁷ See Chapter IV, Sec. 7.1, 8 above.

into its national laws. Since MSs do not apply case law to their national rules without being sued, or object to recognition of foreign established companies, activity by the Commission seems necessary, through a Directive to reach mutual recognition of EU REITs and safeguard the compliant application of EU law. Hereto, EPRA has outlined¹¹⁸⁸:

“If the growth of cross-border property investment in the EU is to be supported, ... (there is need) ... for a coordinated and harmonized approach to the direct tax aspects of cross-border investment ... It is particularly important that the legal certainty in this strategically important area should be achieved through the political process and not through the comparatively arbitrary resolution of disputes that find their way before the courts.”

2.2 Harmonising tax treatment

Assuming that there is room for a compliant EuroREIT, is the EU and its institutions able to assist harmonisation not having competences in the area of direct tax.¹¹⁸⁹ What follows is an exemplified overview on relevant “soft” policies and activities towards harmonisation in the field of direct taxation already taken by the EU to identify potential processes towards a harmonised “EuroREIT”.

2.2.1 The harmonisation model

Since the founding of the EU, company taxation has received particular attention as an important element for the establishment of the internal market.¹¹⁹⁰ In the early years the Commission focused on the harmonisation process of corporate income tax regimes. Traditionally, the Commission has intended to favour a harmonisation in corporate tax rates as well as tax bases. First attempts made by the EU were for Groups of Experts to propose harmonisation models.¹¹⁹¹ They proposed initiatives to achieve a limited degree

¹¹⁸⁸ See EPRA (2009), Sec. 1.14, p. 4 and EPRA (2013), Sec. 6, p. 34/35.

¹¹⁸⁹ See Chapter III, Sec. 2.2.

¹¹⁹⁰ See Dankó (2012), p. 211.

¹¹⁹¹ Most prominent Groups of Experts and their Reports have been the Tinbergen-Report (1953), Neumark-Report (1962), Werner-Report and Tempel-Report (both of 1970) as well as the Ruding-Committee (1992). All of the Reports proposed for the harmonisation of tax systems and tax rates with the objective of harmonising taxes throughout the EU.

of harmonisation of the corporate tax system, base and also rates.¹¹⁹² Action by the Commission to implement the recommendations through Directives proved unsuccessful.¹¹⁹³ To re-launch the integration process the Commission passed a Council Resolution¹¹⁹⁴ giving emphasis “on broad performance standards¹¹⁹⁵ rather than compliance with detailed technical specifications”¹¹⁹⁶ by stating that

*“... the ... work of harmonisation ... have to be directed mainly at national laws having an impact on the common market ...”*¹¹⁹⁷

After the recommendations by the Ruding-Report the Commission accepted the existence of numerous tax obstacles to cross-border activities¹¹⁹⁸ and abandoned the broad objective of corporate tax harmonisation, focussing instead against harmful tax practises i.e. the elimination of remaining form of double taxation in order to promote investment. Influenced by the OECD’s Report on Harmful Tax Competition the Commission expressed their identical concern¹¹⁹⁹ in 1997 leading to the Code of Conduct for business taxation (CoC).¹²⁰⁰ The results in 1999 are commonly known as the “Primarolo-List”,¹²⁰¹

¹¹⁹² See Dankó (2012), p. 211.

¹¹⁹³ However, the European Parliament (the “Parliament”) for the reason that the evaluation basis should be harmonised first before the tax system can be harmonised rejected this directive (see Kopits, 1992, p. 11). Furthermore, there have been two further attempts by the Commission, focussed more on loss compensation, in 1984 and 1985. Those were later withdrawn as well. A draft proposal of 1988 for the harmonisation of the tax base of enterprises was never tabled, due to the reluctance of most MS (see Commission at: http://ec.europa.eu/taxationcustoms/taxation/company_tax/gen_overview/index_en.htm; Commission (2001a), pp. 4, Dankó (2012), p. 212).

¹¹⁹⁴ The Commission established fundamental principles on which the new approach would be based: Legislative harmonisation is limited to adaption, by means of Directives; drawing up the technical specifications voluntarily, Mutual recognition according to the “Cassis de Dijon”-principle (see Council Resolution of 7 May 1985 (as result of the Commission (1985), Part 2.)).

¹¹⁹⁵ See Standards such as by the “Committee for Standardization” (CEN) or the “European Committee for Electro technical Standardization” (CENELEC). MS have to accept products market with the appropriate standard mark as to conform within the “essential requirements” of the Directive that has lead additionally to Art. 114 paras 4, 6 and 9.

¹¹⁹⁶ See Fairhurst/Vincenzi (2003), p. 422.

¹¹⁹⁷ See Commissions (1979).

¹¹⁹⁸ See Nickson (2004), p. 183.

¹¹⁹⁹ The Code of Conduct for business taxation was set out in the conclusions of the Council of Economics and Finance Ministers (ECOFIN) of 1 December 1997 (see Commission (1998) and Commission (1997), but established at a Council meeting on 9 March 1998, under the chairmanship of UK Paymaster General Dawn Primarolo, to assess the tax measures that may fall within the scope of the Code of Conduct for business taxation.

¹²⁰⁰ See European Union (1998). The CoC was a proposal as part of the ECOFIN passing 1998 a tax package consisting of three elements which have been the taxation of savings income, withholding taxes in cross border interests and the CoC that was then accepted in 1998 by the Council for the MS’ (see Council (1998)). The CoC was designed to detect measures, which

the cornerstone for the development of harmonisation with the requirement that MSs shall refrain from introducing any new harmful tax measures (“standstill”) and amend laws or practices that are deemed to be harmful in respect of the principles of the Code (“rollback”).¹²⁰² Some have seen a change of the Commissions policy in this statement,¹²⁰³ but the Commission has stressed that the aim is not quick harmonisation but standardisation in the long-term towards harmonisation. Rather than promoting harmonisation of MSs tax systems, the Commission called for better co-ordination of national policies in between MSs.¹²⁰⁴ Harmonisation actions focus on the elimination of tax obstacles to all forms of cross-border economic activity violating the freedoms.¹²⁰⁵

2.2.2 Harmonising corporate taxation

With its new strategy for EU company tax policy¹²⁰⁶ the Commission concluded that 15 separate sets of company tax rules create numerous tax obstacles to

unduly influence the location of business activities in the EU (see Commission (1997), at A) setting out criteria against which potential harmful measures are to be tested. Criteria have been e.g. level of taxation, benefits reserved for non-residents only, “ring-fencing” measures, advantages given even in the absence of any real economic activities, profit determination in contrast to common rules, lack of transparency etc.

¹²⁰¹The Primarolo-List is named after the Chairmanship of the UK Paymaster General Dawn Primarolo. Findings identified 66 harmful tax regulations out of 271 by which 40 are within MSs and its tax regulations. Further findings were related to 3 in Gibraltar and 23 in dependent or associated territories. These are describable under i.e. the common descriptions of (i) financial services, (ii) insurance, (iii) intra group services, (vi) holding and (v) offshore companies, and (vi) tax free zones (see Report (1999)).

¹²⁰² See Commission (1997), at C and D. Since then, the CoC-Group has been monitoring standstill and the implementation or rollback and reported regularly to the Council (see i.e. Commission (2002), part III, pp. 223-305. Two panels of experts were established; one of academic and one from business and the trade unions to prepare for “an analytical study of company taxation in the European Community” (see Martinez-Serrano / Patterson (2003), p. 19). These reports have led to official legal proceedings by the Commission because of violation of the Treaty due to harmful national company tax regimes since 2001 (see i.e. joined cases C-182/03 and C-217/03 Kingdom of Belgium (C-182/03) and Forum 187 ASBL (C-217/03) v Commission of the European Communities, (2006), ECR I-05479).

¹²⁰³ See Nov (2005), p. 326.

¹²⁰⁴ See Commission (2006), p. 4.

¹²⁰⁵ See Commission (2001b). This activity was assisted going forward with the Commission adopting Communications in 2004 and 2009. The 2004 Communication provided for a strategy i.e. for co-ordinated action in company law and tax to reduce the risk of financial malpractice. In this context, the Commission suggests more transparency and information exchange so that tax systems are better able to deal with complex corporate structures (see Commission (2004)) and the 2009 Communication identified actions that MS should take to promote “good governance”¹²⁰⁵ in the tax area (i.e. more transparency, exchange of information and fair tax competition) (see Commission on EU Harmful tax competition at: http://ec.europa.eu/taxation_customs/taxation/company_tax/armful_tax_practices/index_en.htm).

¹²⁰⁶ Parallel, the European Tax Conference took place in 2002 in Brussels which referred to a new strategy for EU company tax policy that was presented by the Commission in late 2001 already (see Martinez-Serrano/Patterson (2003), p. 23).

cross-border business in the EU.¹²⁰⁷ Therefore, it proposed a long-term comprehensive reform for companies to achieve a consolidated corporate tax base under a single set of tax rules for their EU activities.¹²⁰⁸ The reform was about different models on harmonising corporate taxation, enabling EU multinational enterprises using one company tax system with cross-border consolidation for their EU-wide activities.¹²⁰⁹

The Commission presented four methods for consolidated base taxation: Home State Taxation (HST), Common Consolidated Base Taxation (CCBT); a European Union Corporate Income Tax (EUCIT); and a compulsory harmonized tax base (HTB).¹²¹⁰

Table VI.2.2-1: Comparison of proposals on company taxation

	HST	CCTB	EUCIT	HTB
Application	Optional	Optional	Compulsory or optional	Compulsory
Nr of system	Existing 15 ¹²¹¹	Existing 15 plus new one	Existing 15 plus 1	only 1
Participation	All or some companies	All or some companies	All or some companies	All companies
Main Feature	Tax base computed in accordance with tax code of company's Home MS	New harmonised EU rules for the determination of a single tax base	Compulsory EU CIT for large multinationals	Harmonisation of company taxation rules by devising a single EU company system as a replacement for existing national systems
Advantages	Quick, simple and pragmatic	First step of harmonised tax base on EU level	Tax levied at EU level could be source of revenue for the EU	Most complete solution and best option for improving the functioning of the internal market and the competitiveness of EU enterprises

¹²⁰⁷ See Weiner (2002), p. 1316 with reference to the statement by Philippe de Buck, secretary-general of the Union of Industrial and Employer's Confederations of Europe (UNICE).

¹²⁰⁸ See Commission (2001a).

¹²⁰⁹ See Weiner (2002) providing for a summary of the EU Company Tax Conference in 2002, which proposed their results of different models. As benefits i.e. tax-based distinctions between branches and subsidiaries would disappear; Cross-border mergers would not incur adverse tax consequences and, most importantly, cross-border loss offset would automatically occur (see p. 1315.)

¹²¹⁰ See Weiner (2001) and (2002a), for detailed description of the methods.

¹²¹¹ The Conference on Company Taxation 2002 in Brussels was about the analysis of 15 different tax systems (see Martinez-Serrano/Patterson (2003), p. 16).

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE

EU “soft” policies and the EuroREIT

	Politically feasible	Politically feasible		Higher transparency, efficiency and effectiveness
	Harmonisation of rules not required	Harmonisation of rules not required		
Disadvantages	Competition for tax Bases among MSs	Specific and technical problems for achieving common taxation rules: a new tax code to be devised	Political problems for its approval	Higher political problems for achieving an agreement
	Complications related to its application across MSs	More complexity: multinationals need to know MSs rules to choose for best option	Complexity: all MSs rules	

Source: Original by W. Speckhahn

Implementing a consolidated tax base across the EU would require a mechanism to distribute the EU-consolidated tax base to the MS for taxation at the local rate. The basic idea was to agree a system of consolidated base taxation with formula apportionment to distribute the common tax base among the MSs.¹²¹² Each of the methods generally provides a way for EU companies to calculate their EU group income on an EU-wide basis. Except for certain variations of EUCIT, each method allocates the tax base to the MS.¹²¹³ As the EU economy becomes more integrated and companies increasingly operate EU-wide, apportionment may be a better way to tax companies than the present arm's length system.¹²¹⁴

Under HST, the tax rules that apply for any consolidated group in any given MS depend on the residence of the parent company. Effective tax rates will continue

¹²¹² All methods proposed by the Commission use a formula to allocate the tax base to the MS, which requires to adopting a formula to implement a comprehensive solution. In contrast to a tax system based on separate accounting and arm's length pricing, under formulary apportionment, companies do not attempt to calculate the income of the affiliated entities of the corporate group. Instead, the corporate group first combines (or, consolidates) the income of each of its operatives into a single measure of taxable income. The group then uses a formula to apportion the income to the various locations where the group conducts its business. This formula is generally the share based on of business activity in a location to the total business activity in all locations (Weiner (2002), p. 1315).

¹²¹³ See Weiner (2002a), p. 11.

¹²¹⁴ See Weiner (2001), p. 530.

to vary across and within the MSs under HST.¹²¹⁵ Pursuing the HST option might result in a divergence of tax rules across the MSs, which would not be in the interests of the EU.¹²¹⁶ The allocation of income to each MS of operation requires a new set of company accounts, but represents already extant reality for REITs though. Harmonisation of the common tax base does not seem realistic considering the unsuccessful activities towards harmonisation. The CCTB provides a model that leaves MSs its tax sovereignty since the tax base allocated shall be taxed at the local tax rate of the MS where the allocated tax base originated. The use of international accounting standards such as the IFRS limits the differences in local GAAP systems.

The major issue for the HST and CCTB is the allocation of tax revenue using the method of formulary apportionment, which requires common agreement on a method to calculate the allocation. The method of formulary apportionment is drawn from the US and Canadian system, where the corporate tax base is allocated between the states and the provinces. Under formulary apportionment, companies do not separate the income of an affiliated corporate group along geographic lines, but first calculate net income for the entire group and then apportion that income to each location where it does business through a formula.¹²¹⁷

2.2.3 Summary on harmonisation

Realistic chances are given in literature for the HST-model and the CCTB-model.¹²¹⁸ The Commissions Communication of 2003 stressed the long-term goal of providing companies with a common consolidated tax base for their EU-wide activities by agreeing on certain accounting standards i.e. derived from the IFRS, while giving progress to the allocation mechanism for taxing rights between MSs. Both the regulative and the economic environment changed

¹²¹⁵ See Weiner (2002a), p. 12.

¹²¹⁶ See Weiner (2001), p. 1317 with reference to Herve Le Floch Louboutin, director of the French Ministry of Finance.

¹²¹⁷ See Weiner (2001), p. 523. Literature sees potential distortions using formulary apportionment as it distorts company's business decisions (see Weiner (2001), p. 524 et seqq. with further reference to McLure (1980), Gordon/Wilson (1986), Mintz/Weiner (2001)).

¹²¹⁸ See Nickson (2004), p. 184; European Council Regulation 2157/2001 and related Council Directive 2001/86/EEC; for Germany: Statute for the Introduction of the European Company of December 23rd, 2004.

radically regarding the CCCTB project in recent years. Treaty of Nice and later the Treaty of Lisbon ratified the possibility of enhanced cooperation under a common tax policy like the CCCTB¹²¹⁹, thus providing a basis for a harmonised taxation for the EuroREIT.

3. The EuroREIT model

The EU has taken into consideration the creation of a EuroREIT for assisting the development of the internal market and promoting the freedoms.¹²²⁰ A harmonised REIT model requires the removal of barriers to entry and market differences among MSs, with rules for legal requirements and tax treatments governed by the EU’ legal environment.

With their respective Global REIT Survey’s EY and EPRA presented in 2005 a Global REIT chart listing a “EuroREIT” and proposing an “EU REIT” respectively.¹²²¹ The chart listed the abbreviation “N/A” since the EuroREIT does not exist, but was “to meet increasing demand for European investment exposure with cross-border tax ...”.¹²²²

3.1 The compliant structure

The following lists relevant criteria and details relevant for a harmonised REIT regime compliant, which “fit” with “hard” EU law using the criteria of the structured framework.¹²²³

¹²¹⁹ See Dankó (2012), p. 216.

¹²²⁰ The introduction of a EuroREIT regime will serve a number of interests not only linked to harmonisation, but also drawing offshore funds back onshore and into the national “tax net”. Most of these offshore funds exhibit many of the characteristics of onshore REITs but contribute very little to the tax base of European member states at the moment. The introduction of a European REIT regime may prevent funds from migrating offshore in the first place and positive effect on tax revenues and other indirect economic benefits will bring these vehicles back onshore (see EPRA (2010 Supp), p. 6).

¹²²¹ See Ernst & Young (2005) and EPRA (2005).

¹²²² See Ernst & Young (2005).

¹²²³ See Chapter II, Sec. 5 above.

3.1.1 Legal requirements

(1) Legal form

It is best if REITs follow a corporate typed legal form that allows for and shall be listed at a stock exchange leading to more publicity of the REIT.¹²²⁴ This allows focus on sector or geographical segments, while ensuring sufficient differentiation to existing real estate investment vehicles, namely to open-ended real estate funds. Therefore, the EuroREIT is preferably established in the form of a stock company with limited liability, a legal form known to all MSs domestic company laws already. Since MSs have to recognise a duly established company, even incorporated in another MS, there shall be no ground to hinder the acceptance of such basis. Thus, any legal form included in the Annex to the Parent-Subsidiary-Directive may be used for the EuroREIT in general.¹²²⁵

Where the recognition of a foreign established entity is questioned the EuroREIT may opt to use a “European” entity, that is the European Company (known by its Latin name of “Societas Europaea”, SE¹²²⁶) a company form legally recognised within the EU by the MSs.¹²²⁷ The SE must have a minimum capital of EUR 120.000,¹²²⁸ far below the common understanding of some Euro 13-15m. Whereas MSs requires a larger capital for companies in certain types of activity, the same requirement will apply to an SE with its registered office in that MS. Thus, for a REIT set up in a MS the share capital requirements under

¹²²⁴ See Beck/Droste/Zoller (2004), p. 195

¹²²⁵ See Cornelisse (2006, Part 2), Sec. 6.12, p. 75.

¹²²⁶ The company structure of an SE allow corporate bodies o establish a European Company. It is a legal instrument based on EU law that gives companies the option of formatting a European Company known formally by its Latin name of “Societas Europaea” (SE). An SE may operate on a Europe-wide basis and be governed by EU law directly applicable in all MS. The European Company Statute is established by two pieces of legislation that is a Regulation establishing the company law rules (Regulation 2001) and a Directive on worker involvement (OJ L294, 10.11.2001, pp. 22-32). The Regulation and the Directive entered into force three years after their formal adoptions in the MS (see Martinez-Serrano/Patterson (2003), p. 26, footnote 23).

¹²²⁷ The SE may be established using the legal forms known in the MS as listed for in Annex 1 of the Regulation (2001), “PUBLIC LIMITED-LIABILITY COMPANIES REFERRED TO IN ARTICLE 2(1)”, where all public company forms extant in MS and i.e. used for the purpose of national REIT regimes as well. The SE can be established by way of Merger (Art. 2(1), 17-31), Formation of a Holding Company (Art 2(2), 32, 33) and Formation of a Subsidiary (Art. 2(3), 35, 36) or, by the Transformation of an existing public limited company (Art. 2(4), 37) (see Commission (2001)).

¹²²⁸ See Art. 2 (4) and Art. 37 of the SE Act.

its REIT regime would apply or the required capital according to the common understanding for a EuroREIT.

(2) Residency

A REIT shall preferably be resident in the country under which regime the REIT is listed, but that shall not limit its activities cross-border for the recognition of the domestic REIT in another country.

Using the recognised legal form of an SE, its registered office must be where it has its central administration, its true centre of operations.¹²²⁹ The SE has appear in a register designated by the law of that MS. MSs REIT regimes are of the common understanding that the residence of a REIT must be domestic in the MS under its REIT regime.¹²³⁰ For Euro REIT the question of residence is relevant to taxation of income, but may not be the connecting factor for the tax treatment anymore.

(3) Listing

A fundamental advantage of listed REITs is the fungibility of its shares, ensuring liquidity for investors provided that the shares are widely held. The SE is a public company form based on shares, which can be traded at the stock exchange. Since MSs fear that REIT regimes will be abused for private structures the EuroREIT regime still imposes a listing requirement at a stock exchange within the EU according to the applicable rules of that MS. Since most of the MSs REIT regimes allow listing of its REITs at any regulated stock, provided the stock market is within the EU. This understanding was common between the MS that the EuroREIT as an SE may be listed at any stock in the EU¹²³¹ even other than where the SE has its registered seat.¹²³²

¹²²⁹ The SE can easily transfer its registered office within the EU to another MS without being wound up and to form a new one in another MS (Art. 8 SE Act). The transfer of its registered seat will not have negative tax consequences as well (see Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC).

¹²³⁰ See Chapter II, Sec. 5.1.1 above; Table II.5.1-1: Requirements for Legal form & Residency by MS REIT regimes.

¹²³¹ According to Cornelisse a EuroREIT shall be listed on a stock exchange in at least two different MS (see Cornelisse (2006, Part 2), Footnote 105, p. 75).

¹²³² However, the requirement for mandatory listing could become a hindrance for the market considering the expenditures in time and costs implied (see Ernst & Young (2005)). This can be seen in the US where more and more the REITs do not apply for listing (see Hughney (2005), p.

(4) Shareholder requirements

Generally, the structures contain various minimum investor or shareholder requirements, to ensure that the REIT is owned by a broad and diverse group of investors rather than single shareholders, therefore a EuroREIT should have shareholder requirements too.¹²³³ According to the common understanding identified shareholder requirements shall exist on the single shareholder level as well as on to the free-float of shares.¹²³⁴ No single investor shall hold more than 10% of the shares, or more than 5% of the voting shares. Holding of shares by corporate shareholders shall be limited to below 50%, with sufficient free float to providing for trading of shares, thus liquidity for shareholders. The recommendations on a global level including provisions for the classical US-REIT are at a rate of at least 40% but may be in a range of 50% to 70%.¹²³⁵ This shall be preferred at EU level, although under the “common understanding” a free float starts at a minimum of 15% already, sufficient at start of the model but may be increased over time.

3.1.2 Operating activities

REITs operating activities should be designed as loose as possible as performance indicates. For permitted activities, all regimes focus on the ownership of income-producing properties,¹²³⁶ So that operating activities of the EuroREIT shall be limited to passive real estate activities. A definition of passive real estate activities includes investments in the acquisition of properties for the REIT and sale of properties from the REIT as well as leasing activities with the total AuM.¹²³⁷

Restrictions will apply for activities not passive investments although ancillary services, so-called non-qualifying activities, are not restricted. Ancillary Services

B8). Therefore, going forward it may be considered to give companies the option whether or not to apply for listing themselves at the stock exchange.

¹²³³ See for different opinion Cornelisse (2006, Part 2), Sec. 6.1(11) and 6.12, p. 75.

¹²³⁴ See Chapter II, Sec. 6.1 above (Table II.6.1-1: Common understanding of legal requirements – overview).

¹²³⁵ See Beck (2005), p. 114.

¹²³⁶ See Chapter II, Sec. 5.2 above (Table II.5.2-1: Conditions to Operating activities of REIT regimes in MS – overview).

¹²³⁷ See Chapter II, Sec. 5.2 above.

are conducted for the passive investment activity and for generating passive investment income. Therefore, ancillary services are activities within the value chain of real estate investments from project development to trading, brokerage, finance leasing, asset management as well as property and facilities management, cleaning and activities for third parties. If the REIT conducts such activities outside the limits of a qualified activity the relevant income derived from these activities or services will not benefit from the “tax flow through” REIT treatment but be taxed at the ordinary tax rate of the MS of residence. Ancillary Services shall, therefore, be limited to servicing the assets of the EuroREIT only. Where ancillary service is rendered to third parties a limitation shall apply up to a maximum of 20%¹²³⁸ of the GAV of the AUM.

This allows active asset management, often regarded as enhancing risk and volatility, but in practice the opposite is true. Without restrictions on the investment range of REITs their major purpose as real estate investment vehicles could be abused. The simple holding of assets will not lead to appreciation of the assets, but the use of the whole chain of all property investment activities, from the acquisition and development of property for long term accumulation of rental income and capital appreciation to the holding of shares of other property companies, should be included to a limited quota and certain holding periods.¹²³⁹

The development of land and properties by the REIT should be qualifying activities for a Euro REIT, with room for an understanding on EU level where developments are allowed to a limited extent, since regimes of the MSs provide criteria to limit those activities. The limitations seek to prohibit pure speculative activities, keeping in mind that the REIT regime is intended to provide small investors with access to real property investments otherwise not accessible. For the EuroREIT development activities can be allowed, limited for own assets and own account of the EuroREIT under the “common understanding” of the

¹²³⁸ See i.e. for G-REIT and SIIC at 20% and SIIC and SOCIMI for 50% (Chapter II, Sec. 5.2 above; Table II.5.2-1: Conditions to Operating activities of REIT regimes in MS – overview).

¹²³⁹ See Beck (2005), p. 113.

MSs.¹²⁴⁰ To mitigate development-risks, such activities shall be limited to 20% of the GAV and the volume of a single development of the AUM.¹²⁴¹ Additionally, the EuroREIT shall provide for minimum holding periods, for a min. 5 years after its completion. In case the EuroREIT does not meet these limitations its respective income taxed according to ordinary rules.¹²⁴² This gives, incentive to activities by REITs, which shall assist the long-term holding and management of assets versus short- term profit-maximising of higher risk, and thus a threat to small investors.

The question remains whether the EuroREIT should be limited to certain property sectors. Some regimes have been established solely for the residential market, e.g. the Finnish F-REIT, the Spanish SOCIMI and the Portuguese SIIMO, while other regimes (e.g. the German G-REIT) do not allow investment into residential properties. The G-REIT regime has been challenged on this limitation since the beginning, and it was limited to existing properties constructed before establishment of the G-REIT, whereas new properties are qualifying investments. With the on-going debate in Germany on this issue and experience in other countries, one may assume that the low level for qualifying assets should not apply to the EuroREIT. Using the “common understanding” identified above, almost all regimes do not limit investments into the residential sector, so a EuroREIT should be allowed to invest into this sector for its qualifying operational activities¹²⁴³ and for property investments overseas. According to the “common understanding” a few MSs restrict geographical scope but the EuroREIT should not be so limited as it would be violation of the freedom of movement of capital.¹²⁴⁴

¹²⁴⁰ See Chapter II, Sec. 5.2 above (Table II.6.6-1 Common understanding for the “European REIT” – overview).

¹²⁴¹ Ibid.

¹²⁴² Ibid.

¹²⁴³ In comparison the majority of REIT regimes allow residential investment. In the USA there are 18 REITs classified under this sector. This kind of specialisation, however, is only seen with mature REIT regimes whereas less experienced markets do not have such specialisation (see Chapter II, Sec. 5.2 above).

¹²⁴⁴ See Chapter IV, Sec. 7.1 above.

3.1.3 Status**(1) Asset Test**

At least 70% of the total assets of the EuroREIT must be comprised of qualified investments.¹²⁴⁵ Since almost 50% of all MSs REIT regimes provide for a limitation of the investment volume into a single property the “common understanding” would limit a maximum of 20% of the GAV.¹²⁴⁶

There can be further limitations for qualifying investments i.e. in securities (i.e. mortgages and bonds), including the ones in other REITs, interests in listed real estate companies, shareholdings in other servicing companies and holding of cash. Even though these limitations are not part of the “common understanding” identified already they assist toward the objective of a EuroREIT, but only up to a maximum of 10% of the GAV of the AUM.¹²⁴⁷

(2) Income Test

Under the income test requirements the qualifying income for the Euro REIT such as the renting, leasing and sales activities of real assets should represent a minimum 70% of the REIT’ total income per annum.¹²⁴⁸

(3) Gearing Test

To avoid the distributable profit being eroded and to protect the REIT¹²⁴⁹ against excessive leverage that put many non-REIT property funds in difficulty during the so-called financial crisis, the EuroREIT shall be have leverage restrictions, an accepted concept of MSs REIT regimes already.¹²⁵⁰ These restrictions will be fairly conservative, rate not exceeding 60% of the GAV of the AUM (a level

¹²⁴⁵ See Chapter II, Sec. 5.3.1 above as well as Cornelisse (2006, Part 2), Sec. 6.7.2, p. 72.

¹²⁴⁶ Ibid.

¹²⁴⁷ Ibid.

¹²⁴⁸ Ibid.

¹²⁴⁹ Leverage is considered to pose “... a substantial risk to the stability and the integrity of the financial system...” according to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 095/2010, OJ L174/1, 1.7.2011 (“AIFMD”), para 51.

¹²⁵⁰ See “common understanding” at Chapter II, Sec. 6.3 above (Table II.6.6-1 Common understanding for the “European REIT” – overview).

slightly lower than that found within existing regimes today).¹²⁵¹ A threshold of 60% under the AIFMD¹²⁵² represents not only a common understanding, rather a harmonised level for leverage by financial instruments. Such thresholds serve well for a EuroREIT regime.¹²⁵³

(4) Distribution Test

A fundamental criteria of REITs is the obligation to distribute most of its profits to the shareholder annually, these profits subject to tax at individual tax rate. The EuroREIT should provide for a distribution obligation at the lower and of existing regimes, since funds withheld through depreciation seem not to ensure sufficient scope for active asset management. To secure a minimum equity ratio and liquid funds for its operational business the obligation to distribute profits annually should not comprise the profit in full. Without a clear set in MSs extant REIT regimes recourse is made to the “common understanding” with an obligation that is rather higher than lower, at a minimum level of 90% of the profits of the last financial year.¹²⁵⁴

Regular distribution requirements provide a regular source of tax revenue for governments.¹²⁵⁵ Some REIT Regimes provide retention rules to meet investment strategies by the REIT, but the distribution obligation is different to classical investments in securities.

¹²⁵¹ The average according to the “common understanding” identified in Chapter III, Sec. 3.3 above, is at 65% LTV. There is, however, the Bulgarian regime limiting its JSSPIC for the gearing up to 20% under the condition of duration of 1 year only. But this does not serve for a serious financing of international active REIT vehicles and was not able to proof being considerable during the financial crisis and its leakage of financing. Other regimes give orientation by way of limiting the interest payments due to loan obligations (i.e. the Italian SIIQ) or by setting a ration to the equity existing (i.e. the UK-REIT) but all ending economically around a number at or shortly above the 60% limitation proposed (see Chapter II, Sec. 6.3 above).

¹²⁵² See i.e. Paragraph 263 I KAGB, which provide for a leverage (loan to value) quota of max. 60% of the GAV for the case of an closed-end fund. The AIFM-Directive is implemented in Germany with the new “Kapitalanlagegesetzbuch” (KAGB, Capital Investment Act) on 22 July 2013 (see Table II.6.6-1 Common understanding for the “EuroREIT” – overview).

¹²⁵³ See as well Cornelisse (2006, Part 2), Sec. 6.7.2, p. 72.

¹²⁵⁴ However, distribution quota´ in a range of 80 % to 90% seem to be market standard on a global basis (see Chapter II, Sec. 4.4.2 and Chapter II, Sec. 5.3.4. above; Table II.5.3-2: Conditions to Status of REIT regimes in MS (cont’d) - overview).

¹²⁵⁵ See Lewis (2010), p. 4.

3.1.4 Tax treatment**(1) REIT level**

The tax treatment of the EuroREIT' profits shall be different for income derived from qualifying or non-qualifying activities. To the extent the profits are derived by qualifying activities there shall be no taxation at the level of the EuroREIT. Thus, the EuroREIT is tax transparent following the “flow through” - principle of its (qualifying) income in full.¹²⁵⁶

Different treatment will apply for income derived from non-qualifying activities. Considering that the EuroREIT will be an SE by its legal form the respective tax treatment of an SE in the EU will apply. Consequently, the EuroREIT will not benefit from the tax transparency at the level of the REIT. Therefore, any profits that originate from non-qualifying activities the EuroREIT will be treated the same as any other multinational company in the legal form of an SE. As a consequence the EuroREIT at its (REIT-)level is subject to the tax regime and laws of the MSs and its national legislation where the REIT SE has been established and registered. To the extent the EuroREIT maintains subsidiaries or branches in other MSs each of these entities are subject to tax and charges in the respective MS where the subsidiary or branch is resident. REIT regimes in MSs already today follow this principle commonly either by way of a direct exemption¹²⁵⁷ of the REIT' profit from any tax or by way of applying a zero tax rate or do not calculate the income portion from qualifying activities to the taxable income basis.

This concept looks consequent for the tax treatment of income distributions from non-qualifying activities either in case of a domestic shareholder or in the case of a foreign shareholder, irrelevant whether the shareholder would be an individual or a corporate one. In this context any activity and payment of dividend follows the same way like in the case of any other non-tax transparent company.

¹²⁵⁶ See as well Cornelisse (2006, Part 2), Sec. 6.3, p. 70 et seq.

¹²⁵⁷ See for example the Bulgarian JSSPIC, the France SIIC, the UK-REIT and the G-REIT, Chapter II, Sec. 5.4 above; Table II.5.4-1 Taxation of REIT - overview.

Furthermore, with regard to capital gains the tax treatment shall follow a transparent approach as well. Different proposal could be that the EuroREIT shall be eligible to write off gains realised against the cost price of another real property, subject to a period of three (3) financial years, provided the property was located in the same MS as the property that was sold.¹²⁵⁸ However, this proposal ignores the fact that such proposal limiting the reinvestment to the certain MS in which the gain was realised is suspect to violate EU law while discrimination the free movement of capital within the internal market, which would require the reinvestment to qualify for in any MS though. Therefore, a EU law compliant model already is preferable though. Thus, gains shall flow through to the EuroREIT to its shareholders without being taxed at the level of the EuroREIT itself. Hereto, the “common understanding” identified serves well for the blueprint of this tax model for capital gains. As identified, MSs conceptual approach to capital gains is that they are effectively not taxed either by way of a full exemption or those gains are qualified to be taxable at all.¹²⁵⁹

The above shall be true for the foreign (Euro)REIT operating directly in the Host State though. In case of an extant mutually recognised model for a EuroREIT there shall be according to settled case law no differences being made in which MS the EuroREIT was established since once legally established in one MS the EuroREIT must be recognised as a REIT on all other MSs.¹²⁶⁰ Since the EuroREIT is an EU wide concept i.e. like the SE there is, however, no difference in treatment according to whether or not a MS provide for a local REIT regime though. Thus, a EuroREIT established in a MS shall benefit from a tax transparent treatment at its level for income derived in a Home State alike a EuroREIT established under the Host State’ regime is treatment. Therefore, investments made by a “foreign” EuroREIT will not be taxed at its REIT level though.

(2) Shareholder level – foreign shareholding treatment

At shareholder level the distinction that is made today by MSs REIT regimes with regard to the shareholder’ residence still must be objected. According to

¹²⁵⁸ See Cornelisse (2006, Part 2), Sec. 6.7.3, p. 73).

¹²⁵⁹ See Chapter II, Sec. 5.4 above.

¹²⁶⁰ See ECJ i.e. with Case “Cassis de Dijon” (see Chapter IV, Sec. 3.2 above).

settled case law the ECJ made clear that any differentiation on grounds of residence i.e. of a shareholder constitute a discrimination of the foreign shareholder, thus, is a violation of the freedom of establishment¹²⁶¹ and/or the freedom of movement of capital¹²⁶², as the case may be.¹²⁶³

Consequently, the concept for tax treatment at shareholder level for the EuroREIT must follow an EU law compliant model, which does not differentiate in between resident and non-resident shareholders. Therefore, the model shall ensure equal treatment of the certain type of investment whether it is conducted directly in domestic real property¹²⁶⁴ or, furthermore, indirectly by way of shareholding in a domestic investment company i.e. a domestic REIT or other types of domestic company form. The latter alternative shall be analysed in the following in more detail with the alternatives for solution hereto are threefold:

(2.1) Tax at source

First, in case of income generated by a foreign REIT through its direct or indirect investment in domestic real property in the Host State a source tax by the Host State on income generated may be implemented.¹²⁶⁵ This has been a fundamental and consistent feature of provisions based on the OECD Model Tax Convention for a long time.¹²⁶⁶ This taxation would, however, in principle conform to the OECD-Model according to which the State in which the real property is situated has the right of taxation.¹²⁶⁷ This tax at source in the Host State would safeguard for the taxation of any income derived from real property activities in that Host State.¹²⁶⁸ However, it does neither recognise the key criteria of a REIT to being tax transparent¹²⁶⁹ nor does this alternative respect the fact that a REIT duly established under any MS' national REIT regime must be recognised as REIT under the REIT regime of the Host State as a domestic

¹²⁶¹ See ECJ i.e. with Case “Aberdeen Alpha” (see Chapter IV, Sec. 5.3 above).

¹²⁶² See ECJ i.e. with Case “Commission v Germany”, Case “Commission v Portugal” and Case “Santander” (see Chapter IV, Sec. 5.3 above).

¹²⁶³ See ECJ i.e. with regards to Case “Commission v Belgium” (see Chapter IV, Sec. 5.3 above).

¹²⁶⁴ See Sub-Sec. (1) above.

¹²⁶⁵ See Cornelisse (2006, Part 2), Sec. 6.4, p. 71; EU REIT Coalition (2009), p. 4 et seq., 11.

¹²⁶⁶ See OECD (Report 2007), Recital 21, p. 6.

¹²⁶⁷ See Art. 6 OECD-Model (2012).

¹²⁶⁸ See Cornelisse (2006, Part 2), p. 71.

¹²⁶⁹ Ibid, Sec. 6.3, p. 70.

REIT though.¹²⁷⁰ Therefore, this alternative would be valid only when the income of resident and non-resident REITs from domestic real property would be burdened with taxation of such income at source equally. This concept, again, is contradictory to the leading ideas and objectives of REIT regime that this alternative seem to trigger other equations to solve in terms of cross border taxation of companies though.

(2.2) Withholding tax

Secondly, where a foreign REIT is acting as a (foreign) shareholder through a domestic REIT or other type of (tax transparent) domestic vehicle the EuroREIT may follow the model to tax any income at REIT level and require the EuroREIT to deduct withholding tax before any distribution is made to its shareholders irrelevant of their residence. This concept of withholding taxation equals the treatment under the ordinary SE taxation rules already. Income of the domestic entity (whether REIT or other type of corporate) in the Host State to which the EuroREIT is a shareholder would be burdened with withholding tax in the country of the residence of the (Host State) entity already before the (foreign) EuroREIT as its shareholder receives the dividend payment.¹²⁷¹ In other words, the shareholder receives its dividend representing a portion of the income of the REIT that equals the shareholder’ shareholding less withholding tax deducted there from.

However, this model would not take into account the individual tax rate to which the certain shareholder would be subject to in its State of tax residence. The rate for a withholding tax may be at a level of i.e. 20%¹²⁷², whereas, the personal income tax rate might be lower in the State of residence. Consequently, direct or even economical double taxation is at risk though. For its avoidance proper mechanisms of crediting or refunding portions of taxes to the shareholder are necessary. This seems to be the situation as of today with

¹²⁷⁰ See Case “Cassis de Dijon”, Chapter IV, Sec. 5.4 above.

¹²⁷¹ Whereas, in case the EuroREIT invests cross-border into a non-REIT entity under the Host State laws such dividend payments are already burdened with corporate income tax under the domestic laws at applicable rates though. Thus, in this situation further bilateral agreements may be necessary in order to prevent the dividend income of the shareholder is not, at least, economically, double taxed.

¹²⁷² See Cornelisse (2006 Part 2), Sec. 6.8, p. 73 et seq.

many cases of cross-border income and mechanisms by MSs in place though. This is, unfortunately, a breaking through of key criteria essential for any investor to invest into a REIT as its Shareholder. Thus, such mechanisms may from another point of view not be preferable for MSs, since, first of all this model is lacking Investor’ interest. This was seen recently with the Spanish SOCIMI that provided for such model originally and, thus, was revised *inter alia* for reasons of lack of interest by participants in the Spanish real estate market though.¹²⁷³ Furthermore, the model must be applied in a non-discriminatory way including the domestic shareholders as well. There must, however, not be a tax credit for the domestic shareholder, as the foreign shareholder may not receive such a credit though.¹²⁷⁴ Where the foreign shareholder, however, does not receive a tax credit or similar benefit compensating the tax paid in the Host State under its Home State regime the foreign EuroREIT is placed disadvantageous, thus, leading to an economic double taxation of the same income which, again, would constitute a violation of EU law though. Furthermore, in a situation where the REIT domestically may not be taxed at all or is taxed on its income not producing at least the same amount necessary to be credited to in order to economically compensate the tax at source, there is an effective economic burden to the disadvantage of the foreign REIT only. Finally, the taxation of income at this level leads to escalating tax charges, which make post tax returns from a REIT non-competitive when compared with other investment vehicles and prevents a REIT from being used as a pan-European investment vehicle.¹²⁷⁵

¹²⁷³ See Chapter V, Sec. 4 above.

¹²⁷⁴ Here, the existent regimes seem to follow a similar path and levy the distributions to foreign shareholders with a withholding tax. Even though tax rates differ, however, not significantly, there seem to be a common understanding that, irrelevant of what rate the withholding tax in a MS might be, all of them grant the possibility for reduction under the regulations of a Double Tax Treaty (DTT). Since the existing DTT concluded in between MS are based on the OECD Model Treaty that provides for a withholding tax rate of 15% (this rate is recommended in case of cross-border investments in the case of REITs in the EU by EPRA (See Wijs (2010), p. 13)) in these cases the EuroREIT will impose a withholding tax of that rate to dividend payments to non-domestic shareholders as well. This treatment may be at least applicable to shareholders resident in another MS and limited as well to non-EU shareholders where their country of residence provide for a DTT with the MS where the EuroREIT is resident that provides for equal treatment vice versa. The treatment should be given, therefore, on the basis of mutual understanding, only.

¹²⁷⁵ See EU REIT Coalition (2009), p. 4.

(2.3) Tax transparency

Thirdly, and as another alternative, MSs shall elect for a full tax transparent model for the EuroREIT. This model would require the MS to fully refrain from any taxation either of income at source at the level of the real property or of dividends at the level of the REIT before the distribution of its income through dividend payments to its shareholders. Thereby, leaving the tax treatment of distributions to the level of the shareholders at their personal (income) tax rate. Under this second concept, foreign shareholders in the EuroREIT will immediately benefit from the tax transparency at the level of the EuroREIT shifting their income to its MS of residence.¹²⁷⁶

Acknowledging MSs fear of loss of tax revenue through even tax optimisation models used by internally acting companies it will be difficult for them to accept this flow-through model especially with a view to the foreign shareholder as well. In this scenario, MSs have to accept to losing tax revenue that would have arisen would the distribution to the foreign shareholder have been taxed in their territory already (i.e. according to the withholding taxation model above). This means in fact that MSs have to leave income derived from operational activities in real property within their territory tax exempt or in other words waive their right to tax that is to negate their sovereignty. However, according to the case law analysed¹²⁷⁷ this model is not suspect to violating the freedoms, thus, would be compliant with EU law though.

(2.4) Transparency – consistent tax treatment

The first and second proposal as outlined based on taxation of income at source by the *situs* state in which the property is located as well as levying a withholding tax on distributions to the shareholders does not take extant EU law sufficiently into account.¹²⁷⁸ However, any solution of the issue has to consider EU law properly otherwise not the mere problem is countered rather it represents a reaction to the problem without solving its origin that is a national rule violating EU law though.

¹²⁷⁶ See Cornelisse (2006, Part 2), p. 71.

¹²⁷⁷ See Chapter IV above.

¹²⁷⁸ See for different opinion i.e. Cornelisse (2006, Part 2), Sec. 6.4, p. 71; EU REIT Coalition (2009), p. 4 et seq., 11.

The third model proposed above, however, shall be preferred from an EU law perspective though. This model, uniquely, combines the essential objectives of a REIT regime featuring especially its tax transparency¹²⁷⁹ with the framework and requirements provided under applicable EU law including its detailing by ECJ case law. This model seem to contradict to MSs tax sovereignty since, at first sight, there will be no tax levied at income derived from domestic activities by a foreign tax-resident EuroREIT and, thus, results in a loss of tax revenue in full. Thus, the enforcement of the principle of material universality is limited by the principle of territoriality.¹²⁸⁰ This conclusion is not based on true terms though. There shall be no loss of tax revenue which should be generated from a direct taxation in the country of its source rather this shall be assisted by a model of mutual assistance for the MS of the source to recuperating its eligible tax revenues. Hereto, it is not an argument based on fair grounds to asses such a model of making it difficult for MSs to assess taxes due properly. This picture does not take into account already extant EU-wide legislative instruments, which are capable to solving this issue properly. There shall, however, finally not result any leakage of tax revenue for the MS in which territory the income has been generated. Furthermore, the divergence of the principle of material universality and formal territoriality emerges the effective exchanges of information in between MSs for efficient supervision of fiscal enforcement.¹²⁸¹ The tax that will be levied in the domestic shareholder case shall be recoverable for the MS using existing AEOI mechanisms in the EU though. Consequently, the application of a zero tax rate at the level of the EuroREIT must not have the disadvantage of eroding MSs rights of taxation though.¹²⁸²

There is first of all the mechanism already provided by Art. 26 OECD-Model.¹²⁸³ This rule provides ground for the automatic exchange of information in tax matters.¹²⁸⁴ Though limited since it requires for the information requested to

¹²⁷⁹ See EU REIT Coalition (2009), p. 4, 11.

¹²⁸⁰ See Czakert (2013), p.596.

¹²⁸¹ See Vogel/Lehner (2008), Preamble, Recital 16.

¹²⁸² Different opinion provided by Cornelisse (2006, Part 2), Sec. 6.3., p. 70.

¹²⁸³ See OECD-Model (2012).

¹²⁸⁴ See for details relevant to the automatic exchange of information under Art. 26 OECD-Model (2012) in: Czakert (2013), pp. 597-599.

being substantial information it is sufficient for Art. 26 and a request for information based thereon that the facts submitted to the requested State shall enable it to sufficiently identify the taxpayer relevant.¹²⁸⁵ Obviously, the OECD-Model is not direct legally binding since it is a recommendation only. As such it requires agreeing and integrating such clauses of the OECD-Model into DTTs concluded between MSs. There is a wide use of the OECD-Model, though certain rules i.e. such as on the automatic exchange of information in tax matters¹²⁸⁶ are not an integral part of DTTs today still.¹²⁸⁷ However, meanwhile, there is common understanding in all relevant economies and financial centres of its States to accept the automatic exchange of information as standard amongst themselves for the effective and transparent exchange of information on tax matters though.¹²⁸⁸

Moreover, MSs shall make use of extant binding EU law such as i.e. the AEOID instead already.¹²⁸⁹ The AEOID provide for a mechanism of cooperation of the tax authorities of the MSs *inter alia* in the area of direct taxes. This mechanism is used in the EU since the late 70th when the “Mutual Assistance Directive” was released already.¹²⁹⁰ This Directive implemented basically the scope of Art. 26 OECD-Model into binding EU law. With its revision by the Administration Cooperation Directive¹²⁹¹ in 2011 the scope of the Directive was extended i.e. with respect to real property and income thereof.¹²⁹² The revision of the AEOID the scope of the Directive was extended to all direct “... taxes of any kind

¹²⁸⁵ See Czakert in: Schönfelder/Ditz (2008), Art. 26, Recital 56.

¹²⁸⁶ See Art. 26 OECD-Model (2012).

¹²⁸⁷ This Standard provided by Art. 26 V OECD-Model (2012) was objected, and partly is still, by Austria, Switzerland, Belgium and Luxembourg as well as the standard was not used by many other States though (see Czakert (2013), p. 596).

¹²⁸⁸ See OECD Report (2011).

¹²⁸⁹ See AEOID as regards mandatory automatic exchange of information in the field of taxation.

¹²⁹⁰ See Mutual Assistance Directive (1977). The objective of the Directive was to combat international tax evasion and avoidance, therefore, strengthening collaboration between the MS' tax administrations and facilitate the exchange of information relevant for the correct assessment of taxes on income and on capital. Under this Directive, MS' competent authorities are required to exchange any information which appears relevant for the correct assessment of taxes on income and on capital and the assessment of indirect taxes. It took, however, time to see the Directive being integrated into the national laws of the MS'. Germany, for example, transformed the Directive into national law not before 1985 with the EGAHIG of 1985.

¹²⁹¹ See AEOID. The Directive is transformed into German law with the resolution of the German Bundestag in its session on 6./7.06.2013.

¹²⁹² See Art. 8 AEOID.

....”.¹²⁹³ Herewith the AEOID adapted more closely the standard set by the OECD-Model leading with its extension the EU and its MSs into a system of an obligatory exchange of information though.¹²⁹⁴

With this Directive MSs do not need to have this system to agree and integrate into their single DTTs with other MSs rather relying on the obligation for the exchange of information being applicable law in the EU. Different to recommendations in Literature¹²⁹⁵ to overcome the lack of information in cross-border taxation matters direct applicable law i.e. through Directives, prevent MSs as well as the EU from having to accept a limited coverage of such cooperation to and in between those MSs having agreed upon, whereas, for the remainder cases a patchwork of DTTs only. However, with this Directive MSs have a tool to manage its internal taxation systems, especially as regards direct taxation receiving the necessary information of such cases as with foreign shareholders and its dividends received from another MS though.¹²⁹⁶ Applying mandatory rules and obligations MSs having the power to efficiently cooperate at EU wide level to overcome a lack of information¹²⁹⁷ in cases such as i.e. of foreign shareholders¹²⁹⁸ whether legal or natural persons.¹²⁹⁹

The system proposed above to leaving the income tax except unless it is distributed to the shareholder and taxed in its MS of tax residence does not contradict with extant systems in taxation though. Additional to the mechanisms for assistance and cooperation to exchange information as outlined above there is, furthermore, a refunding system in place with regards to VAT already. The VAT-Refund-Directive provides for a system of cooperation to refund of value added tax to taxable persons not established in the territory of the country.¹³⁰⁰ Even though, the VAT-Refund-Directive is a refunding based system,

¹²⁹³ See Preamble, para 6, and Art. 2 I AEOID, excluding, however, indirect taxes, such as VAT, customs duties and other kinds of excise duties.

¹²⁹⁴ See Czakert (2013), p. 600.

¹²⁹⁵ See i.e. Cornelisse (2006 Part 2), Sec. 6.3 – 6.6, p. 70 et seqq.; EU REIT Coalition (2009), p. 5, 11.

¹²⁹⁶ See AEOID, Preamble, para 2.

¹²⁹⁷ Ibid, para 10.

¹²⁹⁸ Ibid, para 3.

¹²⁹⁹ Ibid, para 7.

¹³⁰⁰ See VAT-Refund-Directive (2008) providing for arrangements for the refund of value added tax to taxable persons not established in the territory of the country following the VAT-Directive (1979).

nevertheless, MSs are used to systems of exchanging information and ex post assessment of tax matters. In conjunction with the AEOID the system shall not be of issue for MSs to agree upon. However, the recovery of tax shall be limited to the amount equalling the one based on the individual tax rate of the shareholder in its MS of tax residence which shall be collected by the tax authorities of the MS of the tax residence of the shareholder and transferred to the tax authorities of the MS of source of the income. In case of income, which comprise of different source MSs the tax collected on that income shall be split proportional to each MS of source. Additionally, in order to prevent the shareholder from any kind of double taxation of such income the MS of tax residence shall refrain from applying additional taxes i.e. by granting a credit in turn, if applicable.¹³⁰¹

The participation of MSs other than the MS of residence of the EuroREIT requires the income portion in the tax base of the EuroREIT be separated and identifiable. Hereto, a split of the accounts of the EuroREIT with respect to its non-domestic income from i.e. direct holdings in real property in another MS or dividends received from shareholdings in a cross-border situation is necessary but shall not create additional administrative burden to the EuroREIT though. Already today, according to almost all REIT regimes the REIT is obliged to split its income into qualifying and non-qualifying income since for the latter the tax transparent regime does not apply.¹³⁰² Thus, the accounts provide for the separate accounting of certain activities already. In order to benefit from full tax transparency for its cross-border activity' income it seem proportionate to have the REIT to provide its tax authority with filings separating not only the income into qualifying and non-qualifying rather additionally according to its source as well.

As it is possible for the tax authority to distinct the tax treatment in between the portion of income resulting from qualifying or non-qualifying income respectively this shall hold true for any portion of income originating from a non-domestic source as well. Thus, any portion of tax payable by the EuroREIT may be

¹³⁰¹ See as well EU REIT Coalition (2009), p. 5, 11.

¹³⁰² See Chapter II, Sec. 5.3.2 above; Table II.5.3-2.

identifiable with its relevant portion of income. Following the separation of the income and its taxation in the MS of residences of the EuroREIT the tax revenue generated there from may be easily be split in between the MS of its origin. However, considering that every portion of income may not be represented in the overall tax base of the EuroREIT due to cost, depreciation et al., thus, any split of tax revenue shall be applied proportionally only.

Either way, it is to acknowledge that the models discussed above all have their pros and cons to be validly discussed. Though, balancing out the different conditions of each of the models discussed it seems that the increasing administrative burden compared to a direct taxing system with refunding mechanism shall be proportional for MSs with respect to EU law being the only possible alternative which is in line with both requirements applicable EU law and attractiveness of the REIT regime in place to investors. The latter is, however, usually not taken into account by the authors proposing for different models though.¹³⁰³ Obviously the above model discussed assumes a situation within the EU where those rules are adaptable by way of a regulation though.¹³⁰⁴

(3) Solution for EuroREIT tax treatment: Home State Taxation-Model

Taking the activities and methods above further to the situation of a REIT established in a MS and more specifically to the proposed tax treatment for the EuroREIT there is reason for the proposed model in this respect. The model proposed is similar to the HST though as it assumes the taxation of income will be effected ultimately in the hands of the shareholder of the EuroREIT only, whereas, the EuroREIT itself is tax transparent though. Thus, the tax rate applies where the shareholder is resident i.e. the corporate income tax rate of a corporate shareholder in its Home State. However, instead of accepting the taxation in the Home State of the Parent only, the proposed model for the tax treatment of the income of the EuroREIT in the hands of its shareholder is the allocation of the tax revenue generated by the MS in which the shareholder is resident (Home State) to each of the other MS' (Host State') that would have

¹³⁰³ See for different models i.e. Cornelisse (2006, Part 2), Sec. 63-6.6, p. 70 et seqq.

¹³⁰⁴ This is not possible for cross-border situations beyond the EU, though, these situations are outside the scope of this thesis, thus, shall not be regarded in detail.

generated tax revenue if they would have been eligible to tax income originated from domestic activities in its territory. It is, however, to acknowledge that the Home State would tax the Shareholder’ income based on its personal tax rate.¹³⁰⁵ Therefore, the tax levied upon the income distributed may not be taxed at a rate equal to the Host State’ tax rate where the income or a portion of that income was generated from activities in that MS though. Consequently, the Host State may not receive a portion of the tax revenue that equals or is relative to the portion of the overall income that was generated and, thus, does not represent the very same amount of tax revenue, i.e. from a withholding tax levied at source, the Home State would have had generated though.

As it is with the original HST method as well the concept of ‘mutual recognition’ is fundamental to home state taxation.¹³⁰⁶ Together with the mechanisms extant for AEOI the proposed treatment for the EuroREIT provide for a concept using the undisputed benefits of the HST and eliminates the essential critic concerning the Home State taxation only. Rather, the proposed treatment safeguard the key criteria of a REIT that is the tax transparency at its level combined with providing tax revenue to the Host State based on the relevant income generated from activities in its territory using the concept of formulated apportionment though. The fact that the revenue may not be at the same amounts compared to them having been taxed directly is a disadvantage that shall be acceptable while balancing out the pros and cons though. In this balance the additional administrative burdens for the MSs may be possible to be shared between the

¹³⁰⁵ Although the Tinbergen-Report (1953) did not regard harmonisation of direct taxes rather on turnover taxes, which have been identified firstly as being an obstacle to the internal market. Therefore, in 1952 the High Authority of the ECSC set up an Committee of Experts, the Tinbergen Committee, according to its Chair Jan Tinbergen from the “Nederlandse Economische Hoogeschool”, Rotterdam, to investigate the impact on the common market of the various turnover tax systems, the Tinbergen Committee at the time recommended the “destination” principle (the equivalence of (value added) taxes levied in the country of consumption (destination principle) or in the country of production (origin principle), as long as the tax was levied on all goods at the same rate) already as the taxing system to overcome national sovereignty (See Hitiris, 2003, pp. 124) and, thus, achieve harmonisation. However, since the destination principle was generally adopted for international trade at that time and the competence of the ECSC was then confined to the coal and steel sector, the Tinbergen Committee recommended the application of the destination principle also for the trade of this sector (see Haufler (2004), p. 22). This divergent opinion may be explained by the time of issuing of that report which was before the foundation of the EC during the “transformation period” of their predecessors and the development of the 1951 (ECSC) to which the European Economic Community towards the EU through the Treaty of Rome in 1957 with which also this subject has become a new dimension on that the opinions have changed.

¹³⁰⁶ See Weiner (2002a), p. 13.

EuroREIT and the MSs. While it shall be proportionate to require the EuroREIT to provide its Home State tax authorities with information on the income and in which MS it was generated at what portion it then seem reasonable to require the Home State based upon this settlement to distribute the respective tax revenue received to the Home State’s relevant.¹³⁰⁷

The approach is similar to the one promoted by EPRA, called the “Single Country taxation”.¹³⁰⁸ However, the proposal above is not about allocating an amount equalling a withholding tax that would have been levied in the Host State on Income derived from the foreign REIT, rather the concept is based upon a true flow through model where the foreign REIT finally distributes the dividends to its shareholders whether they be residents in the Home State of the REIT or resident in another MS. Thus, tax will be levied in the country of residence of each of the shareholders on the amount distributed applying the individual tax rate of the shareholder. Any tax revenue due to the tax authorities in the country of residence of the shareholder will then be split among the tax authorities of the MS where the REIT has originated its income. The split of the tax revenue will be made using the model of formulated apportionment¹³⁰⁹ based on separate accounts provided by the REIT to the tax authorities identifying not only for qualifying income and those parts of the income from non-qualifying activities, furthermore, separate accounts provide for the separation of the origin of the income proportionally. The following shall outline the principles of the proposal:

1. Assuming a REIT A is operating in different MSs (MS A, MS B and MS C) each have a REIT regime, each would recognise, under the principle of Mutual Recognition, the other’s REIT regime, and if the REIT in MS A (A-REIT) makes an indirect investment in the other MSs B and C, MS’ B and C would treat A-REIT in the same way as it would treat one of its

¹³⁰⁷ However, as the EU economy becomes more integrated and companies increasingly operate on an EU-wide basis, apportionment may be seen as a better way to tax companies than the present arm’s length system. Thus, the answer to whether consolidated base taxation with formula apportionment in the EU is a “dream come true” or the “EU’s worst nightmare” may be that it is both (See Weiner (2001), p. 530).

¹³⁰⁸ See EPRA (2009), Sec. 4.11, p. 16 et seqq.; EPRA (2013), Sec. 18, p. 37.

¹³⁰⁹ See Weiner (2001), p. 542.

own REITs (B-REIT and C-REIT respectively) assuming that indirect investment is made using a tax exempt vehicle in MSs B and C respectively.

2. As regards an indirect investment by A-REIT in MSs B and C, it should benefit from tax exemption if and to the extent that the rules of MS B for B-REITs confer tax exemption on corporate subsidiaries of B-REIT. Same shall apply in MS C respectively. In the example shown this results in the income from the investment in MSs B and C, each 25K, is neither subject to tax in B nor in C rather will “flow-through” tax exempt and distributed to A-REIT in full, totalling to 50K, without any tax leakage.
3. A-REIT distributes its profits from its investments in MSs A, B and C, totalling to 75K, according to the rules under MS A for A-REITs at a rate of 90%¹³¹⁰ by way of dividends to its shareholders in MS A (A-Shareholder) that is 67,5K. As part of its tax filing duties A-REIT provide its Tax Office in MS A with accounts separating the income according to its MS of origin (MSs A, B and C respectively) proportionally outlined as a number in per-cent.¹³¹¹
4. The total income of A-Shareholder include the dividend income from A-REIT, less personal allowances and other income related expenses and qualified deductions¹³¹², resulting in a taxable base assumed to be at 50K is subject to A-Shareholder’ individual’ ITR at assumed 35% resulting in tax revenue payable to the Tax Office in MS A at an amount of 17,5K.
5. Through an allocation process handled by the Tax Office of MS A, a portion of the tax revenue, which is attributable to the income from MS B and/or C is transferred to the Tax Offices of MSs B and C respectively.

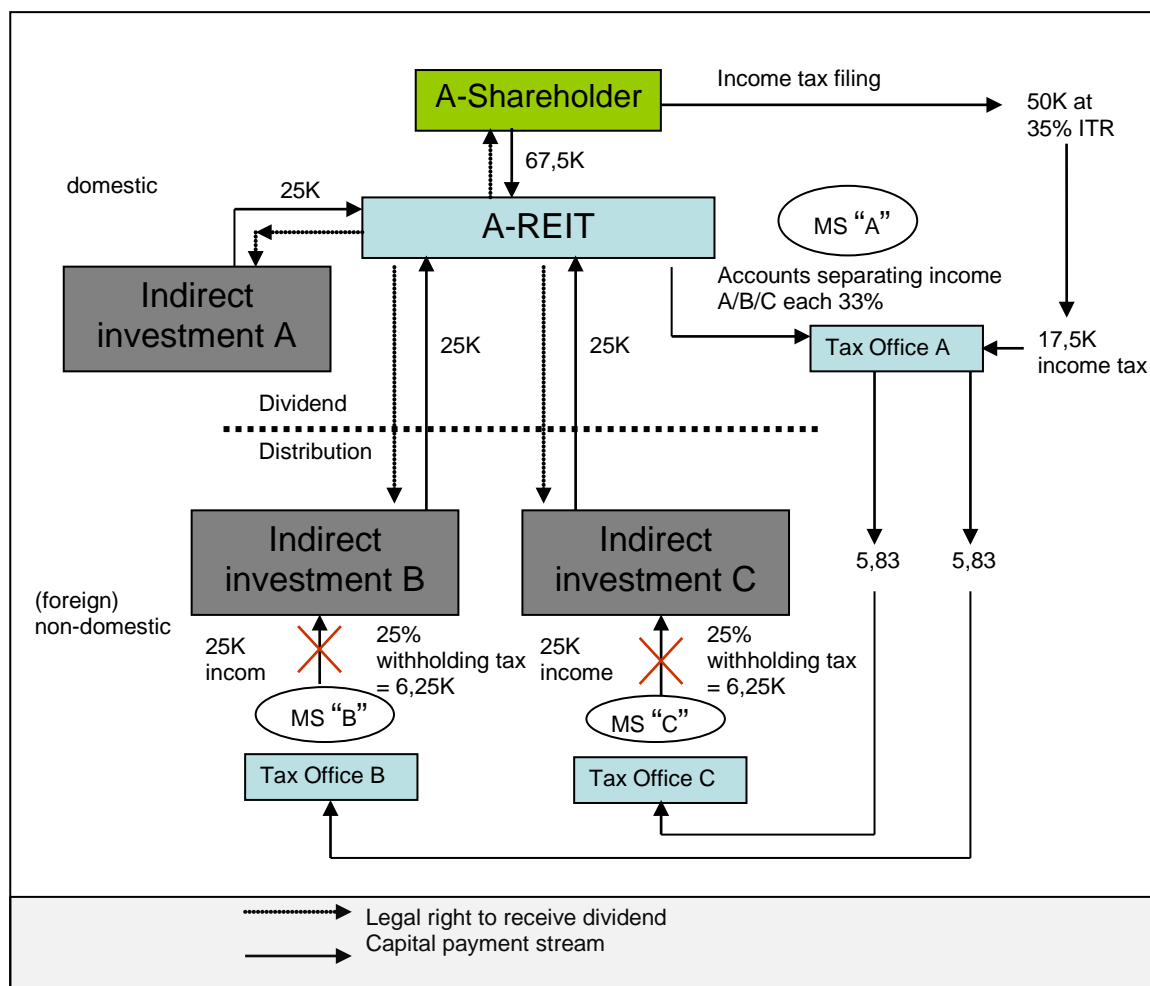
¹³¹⁰ See i.e. Status requirement for the compliant EuroREIT structure (see Sec. 3.1.3 above).

¹³¹¹ According to the Method of formulary apportionment (see this Sec. above).

¹³¹² See i.e. “Werbungskosten” (Income related expenses) and “Betriebskosten und -ausgaben” (Professional expenses and operational cost) as envisaged in §§ 4 IV, 9 ITA.

The allocation process uses the method of formulary apportionment¹³¹³ whereby MS A applies the per-cent number for the income from MS B and/or C according to the accounts provided by A-REIT to the total amount of the tax revenue received. In this example the portion of the income from each of the investments is 33,3% each. Thus, the total tax revenue received is apportioned in relative portions of 33,3% each and distributed by the Tax Office of MS A to the Tax Offices of MSs B and C accordingly. Therefore, the Tax Office of MS A pays out an amount of 5,83K, equalling 33,3% of the total tax revenue received by A-REIT, to each of MSs B and C, whereas MS A keeps 5,83K for itself reflecting its portion of the tax revenue from A-REIT though.

Figure VI.3.1-1: Proposal and formulary apportionment of income - example



Source: Original by W. Speckhahn

¹³¹³ See for details Sec. 2.2.2 above.

Using the example above¹³¹⁴ MS B and MS C each receives a portion of the tax revenue allocated at 5,83K each that is less tax revenue compared to the case of a withholding taxation at source or withheld by A-REIT for direct distribution to the Tax Offices of MSs B and C. Compared to the latter case the tax received under the proposal made is at 93% of the tax that would have been generated by them if they would have levied withholding tax at 25% at source. Same holds true for MS A as well as they would have taxed the domestic income of 25K at the ITR of A-Shareholder at 35% that would have resulted in 8,75K rather 5,83K under the apportionment method. The tax allocated to each of the MSs involved may differ significantly since the tax base of A-Shareholder may vary according to its personal situation though.

However, the leakage in tax revenue received by the MSs involved does not differ compared to the alternative methods proposed i.e. applying a withholding taxation concept.¹³¹⁵ In case of the levying of a withholding tax either at source in MS B and/or C or by way of deduction from dividends by A-REIT before its distribution to A-Shareholder ends up in a comparable situation. Proposals applying withholding tax require the MS of residence of the Shareholder, MS A, to grant a credit for the withholding tax paid. Thus, the portion of the tax revenue that is credited falls apart from MS A and is not compensated elsewhere. Using the example above MSs B and C each would have levied a tax at 25% on the income of 25K, thus, would have withheld an amount of 6,25K. The remaining income from the investment in MSs B and C at 37,5K would have been distributed to A-REIT. Together with the domestic income of 25K A-REIT would have distributed 56,25K only instead of 75K that is less of 18,75K though. Assuming again the offsetting from personal circumstances at 25% (14,06K) the resulting tax base for A-Shareholder would be at 42,19K, thus, ending to an amount of 14,77K tax revenue of which the withholding tax paid in B and C of total 12,5K is credited though. MS A therefore, ends up with a tax revenue payable by A-Shareholder at an amount of 2,27K only. Additionally; there is neither automatism nor mutual application by MSs for providing its residents a credit for withholding tax paid abroad. Thus, the general risk of income to be

¹³¹⁴ Shown in Figure VI.3.1-1.

¹³¹⁵ See EPRA (2009), Sec. 4.10 et seqq., p. 16 et seqq.; EPRA (2013), Appendix 1, p. 36; Cornelisse (2006 Part 2), pp. 69 et seqq.

double taxed, i.e. in cases where the countries involved have not signed a DTT or at least economically be double taxed where the crediting or other types of acknowledgement of the tax paid does not compensate the amount of withholding tax paid already. Therefore, the classical case for withholding taxation at source, the “*situs* country taxation” as proposed i.e. by EPRA,¹³¹⁶ puts both the foreign REIT and its shareholder in a disadvantageous situation. Furthermore, such concept does neither comply with the requirement for a flow-through approach to taxation nor fair allocation of that tax between the *situs* MS where the property is located.¹³¹⁷

The example shows clearly that the application of any tax concept for cross-border income using withholding taxation either at source or to the obligation of the REIT before distributing dividends puts the tax authorities in the MS of residence of the REIT in a significantly disadvantageous situation leaving that MS with less tax revenue compared to a formulary apportionment method used. Furthermore, Investors facing a withholding taxation do not benefit from the flow-through of profits in full since its distributions made are less of the respective amount due for withholding tax though. However, the flow-through of the profits by way of dividends in full, subject to distribution obligation rate though, is key for the attractiveness of any REIT regime as this was especially seen with the Spanish SOCIMI regime having hanged its prior withholding regime to a transparent concept though.¹³¹⁸ Thus, any leakage resulting from taxation does not meet the interest of the Investors which may be with their individual income tax situation taxed at lower rates while benefiting i.e. from domestic regime rules or are just tax exempt at all. In such cases a credit is useless though. Consequently, any concept shall respect a flow-through approach in full accepting the allocation of any tax revenue due for a portion of income. Furthermore, this is the only method to acknowledge the individual and personal income situation of the Shareholder for whom benefit the regime was originally designed. The leakage in tax revenue that may be experienced by MSs tax authorities seems to reflect again a least common denominator as the

¹³¹⁶ See EPRA (2009), Sec. 4.18 et seqq., p. 18 et seqq. and EPRA (2013), Appendix 1, Sec. 18, p. 37 for the so-called “direct approach”.

¹³¹⁷ See Examples provided by EPRA for an “indirect” and “direct” approach at EPRA (2009), sec. 4.10 et seqq., p. 16 et seqq. and Appendix II, pp. 29-43.

¹³¹⁸ See Chapter V, Sec. 4 above.

risk for tax leakage and its net effect shall be minimised to the lowest extent possible. Any leakage left with either MS involved is, however, proportional with a view to the overall aim MSs have sign-up jointly that is to achieve an internal market without barriers though. This proposal may fulfil many dreams of EU businesses. In general, allowing companies to consolidate their EU activities under a single corporate tax base means that EU companies would no longer have to establish transfer prices for many internal transfers within the EU, they would be able to offset losses incurred by an affiliate in one MS against profits earned in another MS, and the tax consequences of cross-border reorganisations within the consolidated group would be simplified. In essence, providing for consolidated base taxation with formula apportionment would allow companies doing business in several MSs to contend with one company tax system and to treat their operations as EU operations. Thus, achieving a common consolidated tax base in the EU outweighs the disadvantages associated with using a formula to distribute that income to the MSs.¹³¹⁹

3.1.5 Sanctions

As with any type of model its governance is essential for compliance of its players thereto. The eligibility to a beneficial tax treatment shall be provided for those REITs only that comply with the requirements of the applicable regime set. This shall not be limited for a (first) single fiscal year rather for coming periods as well when tax exemptions are applied for hidden reserves or transfer taxes i.e. with minimum holding periods. Therefore, sanctions shall exist on the level of penalties only and/or the level of the loss of status. The specifics for certain facts leading to either consequence varies that a determination of a “common understanding” is not selective.¹³²⁰

(1) Penalty

The breach of simple criteria's to the regime of a REIT has to be separated from those of statutory rules, which shall lead to different consequences but should lead to a penalty only. The fine, however, shall be of monetary nature by way of

¹³¹⁹ See i.e. Weiner (2002b), Cornelisse (2006 Part 2), p 75.

¹³²⁰ See Chapter III, Sec. 3.5.2 and Sec. 4.5 above.

a simple payment or by a loss of the beneficial tax treatment respectively for a certain financial period and/or limited to a certain part of income only.

The loss of tax treatment shall apply for breaches of statutory rules only i.e. the violation of the asset test, the income test, the gearing test and the distribution test. The loss will lead to an additional tax charge i.e. applied on those incomes that has been gained from activities in excess of the limits for qualifying activities or from non-qualifying assets. Here, the relevant incomes will be treated according to the standard tax rates applicable for non-REITs i.e. ordinary corporations. Then, corporate income tax shall apply at ordinary rates.

(2) Loss of status

Where, however, the breach of statutory rules is observed for at least 3 consecutive years or where the EuroREIT does not comply with the legal requirements a loss of status shall be the consequence. The latter will especially apply for a de-listing of the EuroREIT or the violation of shareholder requirements such as the limitation of a single-shareholding quota or the free-float requirement.

3.2 Summary for EuroREIT

The discussion above shows a basis for a EuroREIT regime that can be mutually acceptable to the MSs under the common understanding identified above¹³²¹. Extant harmonisation in corporate laws provides a mutually accepted legal form of the SE, building the framework for a EuroREIT. An acceptable “EuroREIT” must not only meet common understandings, but recognise EU law as essential for its capital and real estate market. Any (withholding) tax levied on dividends paid to shareholders holding EU citizenship, or where the REIT is registered in another MS, seems an infringement of EU law on grounds of equal treatment under Freedom of movement and establishment.¹³²² Taking

¹³²¹ See Chapter II, Sec. 6.6 above.

¹³²² Not only MS investors are of importance in this respect. Additionally, it must be realised that Non-MS-investors will invest in the EuroREIT. Because, subject to certain exceptions, Art. 56 of the EU Treaty apply not only to transactions between MS but also to transactions from non-EU countries where their residents can invoke the right of freedom of movement of capital of their investments in EU (see Opinion of the Advocate Général Geelhoed delivered of 10.04.2003 in Case C-452/01, “Margarethe Ospelt and Schlössle Weissenberg Familienstiftung” (Case

applicable EU law as it stands today¹³²³ the common understanding does not change significantly the case for a EuroREIT. The analysis made shows a common understanding already for Legal requirements and Operating activities and Status, and the common understanding is assisted by extant harmonised laws with the corporate form of the SE.

Table VI.3.2-1: Requirements of the EuroREIT - overview

Requirement	Criteria	EuroREIT
Legal	Legal form	European Company - Societas Europaea (SE)
	Share Capital	min. EUR 120.000 but subject to MSs REIT regimes
	Registered Seat	domestic (either MS)
	Listing	obligatory
	Stock market	regulated stock in either MS
	Shareholder conditions	max. 10% single holdings
		min. 15% free float
		< 50% corporate shareholdings
Operating activities (Passive property investments)	Acquisition and Sales	qualified
	Leasing	qualified
	Ancillary Services	Asset Management
		own assets only
		max. 20% GAV (third party services)
		Development
		own assets/account only
		max. 20% of GAV and for each single project
		min. 5 year holding period
Status	Asset Test	min. 70%
	Income Test	min. 70%
	Gearing Test	max. 60%
	Distribution Test	min. 90%
Tax	REIT Level	tax transparent
	capital gains	tax exempt
	qualifying income	tax exempt
	non-qualifying income	taxed acc. MSs applicable tax rates
	Dividend payment	tax exempt
	Shareholder Level	taxed in MS of residence at individual tax rate
Sanctions	breach of single regime requirements	monetary penalty
	breach of statutory rules	loss of tax treatment

“Ospelt”), (2003), ECR I-09743, para 46/47). However, a more detailed analysis of this aspect is out of scope of this thesis as well as on the description of the EuroREIT model and will, therefore, not further evaluated though.

¹³²³ See Chapter IV above.

	breach of statutory rules for 3 consecutive years	loss of status
	violation of legal requirements	loss of status

Source: Original by W. Speckhahn

Unfortunately, under REIT regimes in MSs today, mutual recognition of such a EuroREIT regime faces hindrances, with its different tax regimes the most obvious differences from MSs regimes. The above analysis shows governments' fear of abuse and loss of tax revenue for distributions made to a non-domestic shareholder and the case of a foreign REIT direct investment. Taking the common understanding as the “logic” of MSs regimes the application of a withholding taxation would be a possible formal solution, but there is a case for changing tax treatment towards an approach aligned to EU law. The ideal concept shall be formal relevance with EU law and “compliance” with the key criteria for a REIT regime. Any taxation of income prior to being distributed to the shareholder contrary to a flow-through system does not find Investor' interest for the regime to be accepted.¹³²⁴

This may be achievable already for MSs to extend its domestic REIT regime to the foreign REIT. Art. 24 III OECD-Model may require a country to extend its domestic regime to foreign companies holding domestic immovable property through a PE.¹³²⁵ MSs shall accept income to be taxed in the MS of tax residence of the shareholder, relying on the recovery of the tax revenue with harmonised means such as mechanisms under the AEOID. In balancing the regime compliance with EU law and attractiveness to the market, the administrative burden for MSs to recover tax revenues from income generated in its territory seem economically reasonable and proportional.

A system which preserves balance between a competitive EU - compliant REIT regime and protection of the local tax base, is feasible and will address pave the way for countries looking at introducing a REIT regime.¹³²⁶ A EuroREIT would remove the differences and restrictions in MSs REIT regimes today, but there

¹³²⁴ See i.e. Case Study on the Spanish SOCIMI (Chapter V, Sec. 4 above).

¹³²⁵ See OECD (Report 2007), Recitals 51 et seq., p. 13 et seq.

¹³²⁶ See Hughes/Lewis (2008), p. 97.

seems no room for MSs to remove such differences and restrictions by themselves, since it would require the renegotiation bilateral Treaties, which is time consuming and requires a joint understanding with the other contracting MSs. Change may be achieved by using the mechanisms under the Treaty, adopting regulations or directives according to Art 288 in conjunction with Art. 352. Agreeing on harmonised institutions such as the SE could eliminate these problems for real property investment.¹³²⁷ These features build the framework for any (Euro)REIT regime to interest Investors or for any corporation interested in converting to a REIT. The increasing interest in global real estate investment in this direction should be welcomed by investors and help create a flatter European market.

4. Conclusion

The harmonising process fuelled by ECJ case law and the Commission has led to the emergence for a European framework for a consistent REIT regime in the EU. Reactions to ECJ case law show a process of “cross-fertilisation”¹³²⁸ forcing MSs to confront issues that might have otherwise have lain dormant, creating a “horizontal process of policy adjustment associated with Europeanization”.¹³²⁹ This adjustment concerns direct taxation, an area where the EU has no competences, but can influence domestic change through facilitated coordination and diffusion of policy ideas and practices. The EU role is as “... mediator or facilitator of cross national policy transfer ...”¹³³⁰, setting a level playing field for MSs to acting jointly, cross-loading their concepts for REIT regime on common taxation to seek a EuroREIT regime mutually recognised throughout the EU. The EU is setting the platform and “soft” policies without success in direct tax. Although the EU has abandoned its objective of corporate tax harmonisation, it is active in providing for “soft” policies for harmonising corporate taxation solutions to transferring the “misfit” into “fit”. This can overcome MSs fear of loss of tax base and tax sovereignty while helping the emergence of a harmonised REIT model.

¹³²⁷ See Cornelisse (2006, Part 2), Sec. 7, p. 75.

¹³²⁸ Anthony describes the dynamics of change emerged from pressure by European law leading to change on domestic level in MS as “cross-fertilisation” (see Anthony (2000), p. 83).

¹³²⁹ See Bulmer/Radaelli (2005), p. 345.

¹³³⁰ See Bomberg/Peterson (2000), p. 12.

Chapter VII: Conclusion – The Europeanization of MSs REIT regimes

This research sought to address impact of the EU on domestic legislation in the case of MSs REIT regimes, with focus on their direct tax treatment in cross-border situations. The EU has had a considerable impact on MSs' company and (direct) tax laws, and this research has shown that MSs have already created a joint understanding of the *essentialia* for European REITs. Through a definition of the "REIT" as an investment vehicle, the (true) REIT regimes established in the EU by MSs, the research offers in summary as its main original contribution to knowledge the first comparative analysis of all MSs REIT regimes (with more in-depth investigation of selected jurisdictions), identifying from case law and policy the emergence of a "common understanding" of what a European REIT should comprise. It thereby identifies through a common denominator approach essential elements for a possible harmonised European REIT in the future.

This joint understanding of criteria for REIT regimes follows the example of the classic US REIT,¹³⁸³ but MSs were influenced and guided by local conditions, domestic legal and tax frameworks, and are moving toward a European understanding that has been "cross-loaded" between the MSs. Different MSs have implemented REITs with a common approach on certain corporate law issues (such as the legal form of the REIT) but differing on other issues (such as the level of minimum share capital, the debt to equity ratio, etc.). While details differ there is common understanding for the criteria for a REIT regime, including the tax treatment.¹³⁸⁴ This understanding does not yet form an official consensus, as EPRA outlines, but does create a level playing field for a minimum standard for agreement between MSs.

¹³⁸³ See Chapter II, Sec. 7 above.

¹³⁸⁴ See Chapter II, Sec. 6.4.3 above

In the absence of a fully harmonised internal market, especially in a harmonised and uniform company tax law, all MSs required essentially the same conditions and criteria for companies under its REIT regime. REIT regimes differ still in detailed provisions with variation in structures providing suspect provisions on recognition of foreign REIT companies and cross-border situations in particular.¹³⁸⁵ Case “Cassis de Dijon”¹³⁸⁶ builds a basis for discussion about MSs REIT regimes and compliance with EU law putting MSs REIT regimes not complying with EU law in a disadvantageous position and in violation of EU law.¹³⁸⁷ MSs are prohibited to impose additional regulation, “dual regulation” of a “product” prevented under the mutual recognition rule unless (i) there is justification for a discriminatory measure or (ii) there is no mutual situation in both MSs. Whereas foreign REIT must be treated equally to a domestic REIT in the Host State, the differences between MSs REIT regimes become increasingly fuzzy. Thus MSs have to mutually recognise the duly established (foreign) REIT for equal tax treatment. REITs with cross-border activities or receiving income from property in another MS could consider lodging complaints or bringing the case to the ECJ if they are excluded from the privileged regime under the legislation of that Host State.

Negative integration is provided through settled case law from the ECJ pressuring MSs to change their domestic laws to comply with EU law and freedoms of establishment and movement of capital¹³⁸⁸. ECJ settled case law require mutual recognition of legally established companies throughout the EU and prohibit discrimination on ground of nationality. Herewith, the ECJ assisted the Europeanization of MSs tax regimes providing negative integration through the “back-door”.¹³⁸⁹ This pressure has led MSs to adjust their company laws and REIT regimes, allowing companies to benefit from the domestic REIT regime of being incorporated, resident and listed elsewhere in the EU, the mutual recognition of foreign structures.¹³⁹⁰ Hence, MSs did “adopt their processes, policies, and institutions to new practices, norms and rules, and procedures that

¹³⁸⁵ See Chapter IV Sec. 7.1 above.

¹³⁸⁶ See Chapter IV, Sec. 3.2 above.

¹³⁸⁷ See Chapter V, Sec. 7 above.

¹³⁸⁸ See Chapter IV, Sec. 4 above.

¹³⁸⁹ See Chapter IV, Sec. 8 above.

¹³⁹⁰ See Chapter IV above.

emanate from the emergence of a European system of governance” indicating that the Europeanization of MSs REIT regimes is happening. Change in MSs as a result of “hard” EU law and “soft” policies runs from modest adjustments of individual policies to pressure on national policy styles, and makes a EuroREIT achievable.¹³⁹¹

Europeanization of legal requirements and the rule of mutual recognition seem to be interfered with by criteria for (direct) tax treatment that render mutual recognition useless.¹³⁹² The next task is harmonisation of different (direct) tax treatment models in MSs REIT regimes to overcome a “misfit” with EU law. To safeguard domestic tax revenue MSs are ready to breach “hard” EU law and one of the essential criteria of REITs is tax transparency. Activities and measures non-compliant with EU law to safeguard the tax revenue base leads to rules that discriminate against non-residents.¹³⁹³ Greater trust between MSs is possible by showing that they are not far apart with each of their domestic REIT regimes ‘ and that there may be harmonisation without losing sovereignty in direct tax by agreeing to a level playing field from a common framework of a EuroREIT.

The “common understanding” identified by the comparative analysis provides the ground necessary. Activities on HST and CCTB provide for a level playing field for MSs and the harmonisation of direct tax regimes. The proposal for a single REIT tax base consequently applied together with a full flow-through of dividends to shareholders, thus accepting the tax exempt status of a REIT, combines the different tasks to harmonising the tax treatment through the method of formulary apportionment. This research for the first time applied the method to REITs direct tax treatment, respecting the tax sovereignty of the MSs with a fair share of tax revenue between the MSs involved.¹³⁹⁴ A uniform EU REIT regime, therefore, seems to be a question of time only since MSs may be better off to cooperate for a uniform EU REIT regime. This thesis outlined a uniform EU law-compliant EuroREIT that has not been subject of any academic

¹³⁹¹ See Chapter VI, Sec. 2 above.

¹³⁹² See Chapter IV, Sec. 3 and 4 above for ECJ cases on company law.

¹³⁹³ See Chapter IV, Sec. 7 above.

¹³⁹⁴ See Chapter VI, Sec. 3 above.

research in either law or economics hitherto, even though Literature urged the EU towards introduction of a EU-REIT as the “ideal” REIT.

Assessing the impact of the EU on national policy a distinction between normal EU policy-making and its effects is important. Negative integration through ECJ case law as a “normal” EU policy-making process leads to “a much more horizontal process of policy adjustment associated with Europeanization”. The findings show in the area of direct tax that without any competence for the EU, there will likely be no activity from the MSs neither, unless the Commission leads the process through providing for policy ideas or proposals, so-called “soft” policies. Through the proposal developed in this research to solve the direct tax treatment for REITs the EU might bring forward the harmonisation of MSs REITs with “facilitated coordination”, while MSs keep control of the process and, thus, of their sovereignty in direct tax. Facilitated coordination leaves the initiative for integration in the hands of the MSs, who can reform as they see fit. Even where misfit pressure is absent, the recognition that a practice urged by fellow MSs could strengthen domestic practices with peer review as a contributing element.

Although the Commission has concluded that full EU company tax harmonisation rather than promotion of single tax base for companies shall be of issue, the harmonisation of the tax regimes for REITs is not contrary to this policy. To avoid MSs re-negotiating DTT with relevant MSs and to find solution for tax treatment in cross-border situations a uniform framework for a EuroREIT requires Commission’ action. Industry Groups have lobbied for a uniform framework for some ten years, and without focused activities by either the Commission or MSs establishment of the EuroREIT may not be close. Since activities of the EU in the last decades towards harmonisation have not been successful, its permanent penetration resulted in some harmonisation through secondary EU law such as Directives. This is an interesting development considering the requirement for unanimous decision in direct taxation with the “Parent-Subsidiary”-Directive, the “Merger”-Directive, the Directive on “Administrative cooperation in the field of taxation”(AEOID) replacing former Directives.

Examples for “moderating” impact through “soft” EU policies existing company law with the successful introduction of the Societae Europea (SE), and the EU also moderates activities in the area of direct tax showing readiness and political will to remove obstacles to cross-border investments and achieve an internal market. Thus, activities on EU level have harmonisation effects and there is a driving force from the OECD as seen with the Standard for the automatic exchange of information, mutually agreed by way of bilateral agreements (most recently between Germany and the US in 2013). These activities were taken up by the Commission with its proposal to amending the AEIO. Thus, the Directive sets a framework for new concepts on taxation of income in cross-border situations such as a REIT operating from its Home State in another (Host)State. Technically the best way to assure that MSs will get their fair tax share of income from property located within their territory would be a harmonisation of REIT regimes and tax treatment of shareholders, if not a uniform EuroREIT. For this mechanism to work properly the Home State should accept taxing universal income of companies resident followed by transferring allocated revenue to the Host State of origin of the income through formulary apportionment of tax revenues. This method was used by this research for the tax treatment of REITs. In combination with better exchange of information between MSs tax authorities this can overcome the fear of loss of tax base while accepting the rule of mutual recognition. Taking the “common understanding” identified with top-down Europeanization through down-loading of Treaty freedoms and settled case law, the proposals for the allocation of taxes by formulary apportionment of revenue provide the missing element for a harmonised EuroREIT in the EU.

There is little room for top-down Europeanization, but rather cross-loading and bottom-up activities by and between MSs. Together with mediating and facilitating these activities, interaction between the participants at all levels, vertically and horizontally, promotes Europeanization. There is no contradiction to Bomberg/Peterson (2000) calling for policy transfer, so distortions to competition are avoided. Policy transfer is part of the process leading to Europeanization, a mechanism to explain the change at various levels of the EU

and its MSs. However, it may be doubtful to see harmonised REIT structures within Europe. Although the EU fosters cooperation and common ground among its MSs, the task of achieving one common European REIT umbrella will likely follow a long and uncertain path. Preserving the right balance between a competitive EU law compliant REIT regime and the protection of the local tax base should be a feasible objective. The Commission has stated its readiness to assist activities with the Expert Group under ECOFIN outlining:

*“Harnessing the potential of REITs in attracting increased levels of institutional investment in real estate, including social housing, would be greatly enhanced by ensuring the development of a consistent REITs framework across the EU. A EU level playing field should be created and complex tax structuring should be avoided. The introduction of an EU-wide REIT should be explored. ... Mutual recognition may be established and best practices, such as relating to the most optimal structuring of REITs, should be shared. Cross-border investment through REITs should be facilitated.”*¹³⁹⁵

¹³⁹⁵ See Moran (2013), p. 40.

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Abbreviations and Glossary

A

AE	Anonymos Eteria (AE) is the legal form of a joint stock company under Greece law
AEOI	Automatic Exchange of Information
AEOID	Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64/1, 11.03.2011.
AFM	Authority for the Financial Markets (AFM) in the Netherlands
AG	Aktiengesellschaft (AG) is a listed company on shares according to German Corporations law
AMF	Autorité des Marchés Financiers (AMF) is the French Authority for the Financial Markets
ALFI	Association of the Luxemburg Fund Industry
AIFM	Alternative Investment Fund Manager (as defined by the AIFMD)
AIFMD	AIFM-Directive (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 095/2010, OJ L174/1, 1.7.2011.

APUT Authorised Property Unit Trusts (APUT) is an UK collective Investment scheme for investments in real estate property

B

BaFin Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) is the German Federal Financial Supervisory Authority

BCF Belgian Banking and Finance Commission (BCF) is the market Supervisory Authority of the financial sector in Belgium and has the supervisory on all investment companies registered in its list

BEAMA Belgian Asset Managers Association

BG Bulgaria

BGH Bundesgerichtshof (German Federal High Court)

BMF Bundesministerium der Finanzen or Federal Ministry of Finance

bn billion

BOVESPA Bolsa de Valores de Sao Paulo, Brazil

BSE Bulgarian Stock Exchange in Sofia, Bulgaria

Bund-Länder REITs Commission A commission set up to analyse the G-REIT implications consisting of representatives from the federal and state governments

BVI Bundesverband Investment und Asset Management e.V. (BVI) is the central association representing the interests of the German investment fund industry

C

CBFA Belgian Commission on Banking, Finance and Insurance (CBFA) shortly renamed Financial Services and Markets Authority (FSMA)

CCTB Common Consolidated Tax Base

CEE Central East Europe

CET Contribution Economique Territoriale, the French territorial economic contribution tax.

CFA Chartered Financial Analyst

CFE Cotisation Foncière des Entreprises under French law.

CGI Code Général des Impôts (CGI) is the French Tax Code

CIT Corporate Income Tax

CNMV Comision Nacional del Mercado Valores (CNMV) is the supervisory authority for the financial markets in Spain

CoC Code of Conduct

Commission Commission of the European Union

Corp. Corporation

CR-REIT South Korea REIT

CSSF Commission de Sureveillance du Secteur Financier (CSSF) is the
Luxemburg supervisory authority for the financial market

CVAE Cotisation sur la Valeur Ajoutée des Entreprises under French
law.

D

DG Directorate General (of the European Commission)

D-REIT Dubai REIT

DStR Deutsches Steuerrecht

DTT/ DTTs Double Tax Treaty / Double Tax Treaties

DVFA Deutsche Vereinigung für Finanzanalyse und Asset
Management (DVFA), the German Association for Financial
Analysis and Asset Management, is a Society of Investment
Professionals in Germany

E

ebs European Business School

ECB European Central Bank

ECJ European Court Justice

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE -
ABBREVIATIONS AND GLOSSARY

ECOFIN	Economics and Finance Ministers Conference of the EU
ECR	European Court Reports
ECSE	European Coal and Steel Community
Ed./eds.	Editor/editors
EEA	European Economic Area
EEC	Eastern European Countries
EEC Treaty	Treaty of the European Economic Community
EFTA	European Free Trade Area
e.g.	exempli gratia
ELO	European Landowners' Organization
ELTIFs	European Long-Term Investment Funds
EPF	European Property Federation
EPRA	European Public Real Estate Association (EPRA) is a common interest group, which aims to promote, develop and represent the European public real estate sector
EStG	Income Tax Act (Germany)
et seq.	et sequences (singular) or et sequentia (plural)
EU	European Union

**REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE -
ABBREVIATIONS AND GLOSSARY**

EUCIT	European Union Corporate Income Tax
EuR	Zeitschrift für Europarecht (Journal of European Law)
EUR	Euro
Euribor	Euro Interbank Offered Rate
Euronext	Euronext N.V. is the Amsterdam Stock Exchange
EuroREIT	European Real Estate Investment Trust
et al.	et alii (and others)
F	
FA	Finance Act
FATCA	Foreign Account Tax Compliancy Act (USA)
FAZ	Frankfurter Allgemeine Zeitung (FAZ) is a leading daily Newspaper in Germany
FBI	Fiscale Beleggingsinstelling (FBI) is the Dutch REIT
FCP	Fonds Commun de Placement (FCP) is a mutual investment fund under Luxemburg law
FDI	Foreign Direct investment
FGR	Fonds for Gemene Rekening a trust form under Dutch law

**REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE -
ABBREVIATIONS AND GLOSSARY**

FIBRA	Fideicomisos de Inversión de Bienes Raíces is the Mexican REIT
FII	Fundo Investimento Imobiliário (FII) is the REIT regime by the Brazilian government or Fondos de Inversión Inmobiliario the Chilean REIT-like Fund typed vehicle
FIM	Financial Instruments Markets Directive (the “FIM Directive”), EU-Directive 2004/39/CE of 21 April 2004,
FPI	Fonds Propriétaire d’Investissement (FPI) is a type for a holding for French OPCIs
F-REIT	Finish REIT
FSC	Financial Supervision Commission in Bulgaria
FSMA	Financial Services and Markets Act 2000 (FSMA) of the UK or Belgium Financial Services and Markets Authority
FTA	French Tax Authorities
FTC	French Tax Code
FTSE	Financial Times Stock Exchange is an independent company jointly owned by The Financial Times and the London Stock Exchange. FTSE Group (FTSE) is a world-leader in the creation and management of over 120,000 equity, bond and alternative asset class indices.
FTTA	Foreign Transaction Tax Act (FTTA) of Germany

G

GAAP	Generally Accepted Accounting Principles
GAV	Gross Asset Value
GCL	General Corporations Law (GCL) of the State of Maryland, USA
GDP	Gross domestic product
GmbH	Gesellschaft mit beschränkter Haftung (GmbH) is a limited liability company under German Corporate law
G-REIT	German-REIT or German Real Estate Investment Trust

H

HKSFCC	Hong Kong Security and Financial Committee
HMT	Her Majesty's Treasury
HMRC	Her Majesty's Revenue and Customs
HK-REIT	Hong Kong REIT
HST	Home-State-Taxation-Model
HTB	Harmonised Tax Base

I

ICTA	Income and Corporation Taxes Act (ICTA) of the UK
i.e.	id est
IEIF	Institut d'Economie et d'Investissement Francaise
IF	Investment Fund (IF) is a vehicle for collective property investments under Netherlands law
IFD	Initiative Finanzplatz Deutschland (IFD) is a lobby group for the German financial sector. It operates in cooperation with the Federal Ministry of Finance and the Bundesbank
IFRS	International Financial Reporting Standards
IGA	Inter Governmental Agreement
IIF	Immobilien Investmentfonds (IIF) is a REIT-like investment vehicle under Austrian law
Inc.	Incorporation
ING SICAFI Belgium Return Index	ING SICAFI Belgium Return Index is a performance Index of all listed SICAFIs in Belgium by ING Investment Belgium
INREV	European Association for Investors in Non-listed Real Estate Vehicles
InvG	Investmentgesetz (InvG) is the German Investment Act that comprises of the legal framework for OEPPFs

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE - ABBREVIATIONS AND GLOSSARY

ImmoInvFG Immobilien-Investmentfondsgesetz (ImmoInvFG) is the real estate investment Act providing for the regulatory framework for IIFs in Austria

ICTA Income and Corporation Taxes Act 1988 (UK)

IPO Initial Public Offering

IRC Internal Revenue Code of 1986 (IRC) is the Income tax code in the USA

I-REIT Israel REIT

IRS Internal Revenue Service (USA)

ISA Individual Savings Accounts

IStR Internationales Steuerrecht (International Tax Law)

IStR-LB Internationales Steuerrecht-Länderbericht (International Tax Law – Country Report)

ITA Income Tax Act

ITR Income Tax Rate

J

J-REIT Japan REIT

JSE Johannesburg Stock Exchange (South Africa)

JSSPIC Joint Stock Special Purpose Investment Company (JSSPIC) is the Bulgarian REIT

K

KAG Act Bundesgesetz vom 23. Juni 2006 über die kollektiven Kapitalanlagen (Kollektivanlagengesetz) of Switzerland

KAGB Kapitalanlagegesetzbuch (Capital Investment Act), implementing the AIFM-Directive (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 095/2010, OJ L174/1, 1.7.2011 ("AIFMD")).

L

LG Landgericht (German District Court)

LLC Limited Liability Company according to US Federal States Corporations law

LLP Limited Liability Partnership according to US Federal States Corporations law

LPT Listed Property Trust is the Australian REIT

L-REIT Lithuania REIT

Ltd Limited

M

max.	Maximum
M-DAX	Midicap-Index of the German stock (Deutsche Börse), which comprises of the 50 liquid shares of the second row of the DAX stock market Index totalling 100 stock companies
MFT	Mutual Funds Trust (MFT) is the REIT regime by the Canadian government
mn	Million
min.	Minimum
M-REIT	Islamic Real Estate Investment Trust is the REIT regime by the Malaysian government
MS or MSs	Member States of the European Union

N

N/A	Not Applicable
NAREIT	National Association of Real Estate Investment Trusts (NAREIT) is the representative voice for the US-REITs and publicly traded real estate companies worldwide
NAV	Net Asset Value
NJW	Neue Juristische Wochenschrift

NV Naamloze vennootschap (usually abbreviated N.V. or NV) is the Dutch term for a public limited liability company. The company is owned by shareholders, and the company's shares are not registered to certain owners, so that they may be traded on the public stock market. The phrase literally means “innominate partnership” or “anonymous venture” and comes from the fact that the partners (the shareholders) are not directly known. This is in contrast to the term for a private limited company, which is called Besloten Vennootschap.

Nyrt. Nyilvánosan működő részvénytárság (Public limited company according to the Company Act of Hungary)

O

OECD Organisation for Economic Cooperation and Development

OEPF Open-End Property Fund (OEPF) is a collective investment scheme under the German Investment Act

OJ Official Journal of the European Union

OPCI Organisme de Placement Collectif dans l'Immobilier (OPCI) is a property funds regime under French law

P

PE Permanent Establishment

PFPO Property Fund for Public Offering (PFPO) is the REIT regime by the government of Thailand

**REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE -
ABBREVIATIONS AND GLOSSARY**

PLC Public Limited Company

P-REIT Pakistan REIT

Ph-REIT Philippine REIT

PMRECON Paul Mitchell Real Estate Consultancy

PR-REIT Puerto Rico REIT

PUT Property Unit Trust (PUT) is the South African REIT

Q

Q Quarter

R

RD Royal Decree

REIC Real Estate investment Company (REIC) is the name for the
Greece REIT regime

REIF Real Estate Investment Fund is the name for the Costa Rican
REIT-like regime

REIT Real Estate Investment Trust

REOC Real Estate Operating Company

RICS Royal Institution of Chartered Surveyors

S

S-REIT	Singapore REIT
SA	Société Anonyme (SA) is a Limited Liability Company according to French Corporations law or Sociedad Anónima the corporate legal form in Spain
SCA	Société en Commandite par Actions (SCA) is Corporation on shares according to French Corporations law
S & P 500	Standard & Poor's 500 (S&P 500) is a performance Index by the Rating Agency Standard & Poor's of capital investments in the top 500 stock listed companies worldwide and the most followed equity index
SE	Societas Europaea
SE Europe	South East Europe, comprising of the countries: Romania, Bulgaria, Turkey, Serbia and Greece
SEC	Securities and Exchange Commission (SEC) is a supervisory Authority for the US financial sector
SICAFI	Sociétés d'Investissement à Capitale Fixe Immobilière (SICAFI) is the Belgium REIT
SICAV	Société d'Investissement à Capital Variable (SICAV) is an investment company in the form of a joint stock company (société anonyme)
SIF Act	Special Investment Fund Act of Luxembourg

SII	Sociedad de Inversion Inmobiliaria (SII) is a real estate investment company under Spanish law
SIIC	“Sociétés d’Investissement Immobilier Cotée” (SIIC) is the French REIT
SIIQ	Società di Investimento Immobiliare Quotate (SIIQ) is the Italian REIT
SME	Small and Medium-sized Enterprises
SOCIMI	Sociedades Cotizadas de Inversión en el Mercado Inmobiliario (SOCIMI) is the Spanish REIT
SpA	Società per Azioni the Italian corporate legal form
SPIC	Special Purpose Investment Companies Act (Bulgaria)
SPV	Special Purpose Vehicle
StuW	Steuer und Wirtschaft (Tax and Economy (Journal))
SZIT	Szabalyozott Ingatlanbefektesi Társaság (Hungarian REIT)
T	
TEGoVA	European Group of Valuers Association
TP	Taxe professionnelle (TP), a local business licence tax on tangible assets (i.e. real properties etc.) under French Tax laws.
Treaty	Treaty of the European Union

T-REIC Real Estate Investment Company (T-REIC) is the REIT regime by the Turkish government

Tr Trillion

TRS Taxable REIT Subsidiary

U

UCITS Undertakings for Collective Investment in Transferable Securities (UCITS)

UPREIT Umbrella Partnership Real Estate Investment Trust (UPREIT) is a special type of REIT in the USA

UK United Kingdom

UK-REIT United Kingdom REIT or United Kingdom Real Estate Investment Trust

ULI Urban Land Institute

USA United States of America (USA or US)

USD United States Dollar

US-REIT United States REIT or United States Real Estate Investment Trust

V

VAT Value Added Tax

Y

YEL Yearbook of European Law

Z

ZEW Zentrum für Europäische Wirtschaftsforschung GmbH (ZEW) is
a Centre for European Economic Research

REAL ESTATE INVESTMENT TRUSTS (REITS) IN EUROPE
EXHIBITS

1. Exhibit II.4-1: Chronological overview of REIT and REIT-like regimes globally

Year	Country	REIT-Regime	Abbreviation
1960	USA	Real Estate Investment Trust	US-REIT
1969	Netherlands	Fiscale Beleggingsinstelling	FBI
1972	Puerto Rico	Real Estate Investment Trust	PR-REIT
1985	Australia	Listed Property Trust	LPT
1989	Chile	Fondes de Inversión Inmobiliario*	C-FII
1991	Luxemburg	Unions Collective d'Investissement*	UCI
1992	Thailand	Property Fund for Public Offering*	PFPO
1992	Thailand	Property Fund for Public Offering*	PFPO
1993	Brazil	Fundo Investimento Imobiliario	FII
1994	Canada	Mutual Funds Trust	MFT
1995	Belgium	Société d'investissement à capital fixé en Immobilière	SICAFI
1995	Turkey	Real Estate Investment Company	T-REIC
1995	Argentina	Fideicomiso Financiero Inmobiliario*	FFI
1997	Costa Rica	Real Estate Investment Fund*	REIF
1999	Greece	Real Estate Investment Company	REIC
1999	Singapore	Real Estate Investment Trust	S-REIT
2000	Japan	Real Estate Investment Trust	J-REIT
2001	South Korea	Real Estate Investment Trust	CR-REIT
2003	Austria	Immobilien Investmentfonds*	IIF
2003	Hong Kong	Real Estate Investment Trust	HK-REIT
2003	Taiwan	Real Estate Investment Trust	T-REIT
2003	France	Société d'investissement Immobilière Cotées	SIIC
2003	Uruguay	Real Estate Investment Trust*	U-REIT
2004	Bulgaria	Joint Stock Special Purpose Investment Company	JSSPIC
2004	Mexico	Fideicomisos de Inversión de Bienes Raíces	FIBRA
2005	Malaysia	Islamic Real Estate Investment Trust	M-REIT
2006	Dubai	Real Estate Investment Trust	D-REIT
2006	Israel	Real Estate Investment Trust	I-REIT
2007	Luxemburg	Special Investment Fund*	SIF
2007	United Kingdom	Real Estate Investment Trust	UK-REIT
2007	Germany	Real Estate Investment Trust	G-REIT
2007	Italy	Società di Investimento Immobiliare Quotate	SIIQ
2007	Thailand	Real Estate Investment Trust	Thai-REIT
2007	New Zealand	Portfolio Investment Entity*	PIE
2008	Lithuania	Real Estate Investment Trust	L-REIT
2008	Pakistan	Real Estate Investment Trust	P-REIT
2008	India	Real Estate Mutual Funds*	REMF
2009	Philippines	Real Estate Investment Trust	Ph-REIT
2009	Finland	Real Estate Investment Trust	F-REIT
2009	Spain	Sociedad Cotizada de Inversión en el Mercado Inmobiliario	SOCIMI
2010	Portugal	Sociedades de Investimento Imobiliário*	SIIMO
2011	Hungary	Szabályozott Ingatlanbefektési Társaság	SZIT
2013	Ireland	Real Estate Investment Trust	IRE-REIT
2013	South-Africa	Real Estate Investment Trust	SA-REIT

*REIT-like only

Derived from: EPRA (2013)

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2.

2. Exhibit IV.4-1: Cases on company/corporate law – overview

#	Year	C-	Case	MS	Freedom	Decision
1	1986	79/85	Segers	NL	Right of Establishment	A company may pursue its activity in a MS different from the MS where its branch/registered office is established
2	1988	81/87	Daily Mail	UK	Right of Establishment	Company' are not eligible to transfer its seat to another MS while retaining its status of Company in Home State
3	1993	330/91	Commerzbank	UK	Right of Establishment	Different treatment of fiscal residency is covert discrimination
4	1994	1/93	Halliburton	NL	Right of Establishment	Companies are free to choose its form of establishment; Equal treatment to comparable situations is mandatory
5	1999	212/97	Centros	DK	Right of Establishment	Different legal conditions i.e. minimum capital requirements in the Home State of incorporation and the Host State do not entitle the Host State to refuse "mutual recognition"
6	1999	200/98	X and Y	SWE	Right of Establishment	Granting certain tax benefits to domestically operating company's only while hindering the establishment in another MS of ... a company incorporated under its legislation violates the freedom
7	2002	208/00	Überseering	D	Right of Establishment	Incoming companies have to be respected on the basis of the mutual recognition doctrine following the "Cassis de Dijon"-principle
8	2003	9/02	Lasteyrie	F	Right of Establishment	MS are precluded of measure linked with moving of companies likely to hinder a company to move cross-border breaches the freedom of establishment
9	2003	167/01	Inspire Art	D	Right of Establishment	Mutual recognition principle comprise not only a company's legal personality, but the entire legal system of the state of incorporation
10	2005	411/03	SEVIC	D	Right of Establishment	The refusal of a national commercial court to register a cross-border merger may constitute a violation of the freedom of establishment
11	2006	196/04	Cadbury Schweppes	UK	Right of Establishment	Company is eligible for protection under the scope of the freedom of establishment where the "... incorporation ... correspond with an actual establishment intended to carry on genuine economic..."

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						Otherwise, such establishment may be viewed as being a “wholly artificial arrangement”.
12	2008	210/06	Cartesio	HUN	Right of Establishment	MS are not precluded of legislation under which a company incorporated under the law of that MS may not transfer its seat to another MS whilst retaining its status as a company governed by the law of the MS of incorporation (“Cartesio-Rule”) unless national law forbids any kind of transfer of seat, requires winding-up or liquidation though.
13	2011	371/10	National Grid	NL	Right of Establishment	A company transfer of its registered seat does not affect its status as company under the Home State laws

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3. Exhibit IV.5.2-1: Case law on (direct) tax – “Equal treatment”

#	Year	C-	Case	MS	Freedom	Decision
14	1995	279/93	Schumacker	D	Free movement of persons	Differential treatment of residents v. non-residents is discriminatory when situations “comparable”
15	1995	80/94	Wielockx	NL	Free movement of persons	A “comparable situation” is in place where non-resident derives his income entirely or almost exclusively from economic activities in the Host-State
16	1999	391/97	Gschwind	D	Free movement of persons	Threshold for eligibility to domestic tax regime may be at 75-90%
17	2003	169/03	Wallentin	SWE	Free movement of persons	Tax benefits must be granted to residents and non-residents equally.
18	2012	39/10	Estonia	EST	Free movement of persons	A threshold set at 75% required for Home State income shall be sufficient for “significant economic activity” to benefit from allowance in Home State

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4. Exhibit IV.5.3: Case law on (direct) tax – Access to tax of non-resident companies

#	Year	C-	Case	MS	Freedom	Decision
Equal treatment						
19	2006	386/04	Stauffer	D	Free movement of capital	Any non-resident company being comparable in its essential criteria with the criteria for such resident companies shall be treated as a resident company
20	2011	25/10	Missionswerk	BEL	Free movement of capital	MS is prohibited from establishing rules that take as its criterion the location of operations to benefit from (lower) domestic tax rates
21	2011	384/09	Prunus	F	Free movement of capital	A permanent regime of tax levied on direct holdings of non-resident companies constitutes a restriction of the freedom.
Prior authorisation						
21	1999	320/97	Konle	A	Free movement of capital	Activities involving immovable property shall not be conditional to a prior authorisation by the Host State
23	2000	423/98	Albore	I	Free movement of capital	See Case “Konle”
24	2012	39/11	VBV	A	Free movement of capital	Investment funds legally established in a MS must not be subject to a procedure of authorisation in another MS prior selling its units
25	2011	250/08	Belgium	P	Free movement of capital	Limitation of tax benefits to the fact having paid registration duty in the MS before constitutes a restriction of the free movement of capital
26	2000	54/99	Scientologie	F	Free movement of capital	Any rule of authorisation may be lawful though where investors subject to the authorisation are given indication as to the specific circumstances in which the authorisation is required, otherwise a rule contravene the principle of legal certainty
Tax benefits						
27	1986	270/83	Avoir fiscal	F	Right of Establishment	Tax credits shall be eligible for non-resident companies in Host State
28	2004	319/02	Manninen	FIN	Free movement of capital	Tax credits or foreign dividends must be given
29	2007	292/04	Meilicke	D	Free movement of capital	See Case “Manninenn”

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30	1999	311/97	RBS	GR	Right of Establishment	Higher taxes for permanent establishment of foreign company are discriminatory (Freedom to choose legal form of establishment)
31	1996	107/94	Asscher	NL	Free movement of persons / Right of Establishment	Higher taxes may be non-discriminatory where other tax benefits provide for trade off.
32	2006	253/03	CLT-UFA	D	Right of Establishment	Higher taxes to branch discriminatory (Freedom to choose legal form of establishment).
33	2004	315/02	Lenz	A	Free movement of capital	Tax rate on foreign dividends shall not be higher as to domestic ones
34	2007	443/06	Hollmann	P	Free movement of capital	Capital gains shall not be taxed at higher rates in case of non-resident recipient
35	1999	307/97	Saint-Gobain	D	Right of Establishment	Host State must grant to permanent establishments the same advantage as to resident companies.
36	1993	330/91	Commerzbank	UK	Right of Establishment	Repayment of overpaid tax shall be eligible for non-fiscal-resident companies
37	2001	397&410/98	Metallgesellschaft	UK	Right of Establishment	Cashflow advantages constitute a breach of the right of establishment.
38	2002	324/00	Lankhorst	D	Right of Establishment	Interest payments on loan from parent company shall be deductible from income unless rate not arm's length.
39	2003	168/01	Bosal	NL	Right of Establishment	Deduction of expenses related to foreign shareholding shall be eligible
40	2006	471/04	Keller	D	Right of Establishment	See Case "Bosal"
41	2006	152/03	Ritter-Coulais	D	Free movement of persons	"Negative income" from immovable property in the Host States shall be taken into account for the purpose of determining the rate of progressive taxation
42	2007	182/06	Lakebrink	LUX	Free movement of persons	Losses from immovable property shall be deducted from income in Host State
43	2003	364/01	Heirs of Barbier	NL	Free movement of capital	Debts related to immovable property shall be lawfully deductible from the tax base.

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44	2003	234/01	Gerritse	D	Free movement of services	Deduction of business expenses linked to the economic activity shall be eligible for non-resident companies
45	2011	450/09	Schröder	D	Free movement of capital	Expenditures directly linked to the activity and necessary to generating the income shall be deductible from the taxable income
46	2009	303/07	Aberdeen Alpha	FIN	Right of Establishment	Existence of special tax regime and different corporate characteristics do not exclude comparability
47	2011	284/09	Commission v Germany	D	Free movement of capital	Dividends distributed to non-resident companies must not be taxed disadvantageously
48	2000	35/98	Verkoijen	NL	Free movement of capital	A rule exempting dividends from tax received from a domestic company only was found to be contrary to the free movement of capital
49	2012	338/11	Santander	F	Free movement of capital	Different rules for resident and non-resident companies with no permanent establishment violate the freedoms.
50	2004	268/03	De Baeck	BEL	Right of Establishment	Capital gains on shares shall not differ as regards residency of company sold
51	2004	9/02	Lasteyrie	F	Right of Establishment	Taxation of unrealised capital gains at the time of transfer of the residence violates the freedom
52	2006	345/05	Portugal	P	Right of Establishment	Deferral of capital gains to the condition of reinvestment in real property in the MS granting the incentive violates freedom
53	2007	104/06	Sweden	SWE	Right of Establishment	See Case "Portugal"
54	2011	155/09	Greece	GR	Freedom of Establishment	The condition of permanent residence for access to tax benefits is a covert form of discrimination.

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ANNEX 1, European REITs overview

Requirement	FBI	SICAFI	REIC	SIC	JSSPIC	UK-REIT	G-REIT	SIG	L-REIT	F-REIT	SOClMI	SZT	IRE-REIT
Legal form	NV, BV, FGR or similar foreign legal form	SA, SCA	AE	SA, SCA	Joint Stock Company (AD)	Closed-ended Company	Joint Stock Company (AG)	Societas per Actum (SPA)	Joint stock comp. / limited liability company	Public limited company (EU) / closed ended (non-EU)	SA	Nyrt	PLC
Share Capital	EUR 46,000 domestic (either MS)	EUR 1.25mm domestic (either MS)	EUR 25m domestic (either MS)	EUR 18mm domestic (either MS)	EUR 250,000 domestic	EUR 60,000 domestic	EUR 13mm domestic	EUR 40mm domestic	EUR 50,000 domestic	EUR 500 domestic or other EU/EEA	EUR 5m domestic or other EU/EEA	EUR 37m domestic	EUR 37m domestic
Registered Seat	optional obligatory for regulated FBIs	obligatory	obligatory	obligatory	obligatory	obligatory	mandatory	mandatory	not mandatory; private REIT	obligatory	obligatory	obligatory	obligatory
Listing	any EU stock exchange	any regulated stock exchange market	any EU stock exchange	any regulated stock exchange market	any EU stock exchange	any recognised stock exchange	either MS / EEA	either MS / EFTA	any regulated stock exchange market in the EU / EEA	any regulated stock exchange market in the EU / EEA	any regulated stock exchange market in the EU / EEA	domestic stock exchange	any regulated stock exchange market in the EU
Shareholder conditions	min. 75% non-Dutch resident shareholders		none		max. 50 Founders	max. 10%	max. 10%	max. 51% shares	n/A				max. 9% per single shareholding and max. 5 each shareholdings
Corporate governance	max. 45% (75% if non-reg.) single holding				min. 30%					max. 10%		max. 10% shares	max. 10%
Individual holdings	max. 25% (5% if non-reg.) single holdings												
Free float	n/A	min. 30%			min. 15% shareholding rights with individual shareholdings of less than 2% each	min. 35%	min. 15% free float but representing less than 3% of voting rights	min. 35%		min. 25% (at MAB less than 5% possible)	min. 25% owned by money shareholders (shareholding each, max. 10% voting rights with int inv.		min. 35%
Voting rights	n/A				max. 5% single holding			max. 51% voting rights					
Operating activities (Passive property investments)	no restrictions	immovable property	min. 80% qualified investments	immovable property	immovable property	min. 3 immovable properties	immovable property	immovable property	min. 4 immovable properties within first 12 months	immovable property	min. 3 years holding of qualifying assets	min. 70% passive investments	min. 3 immovable properties in first 3 yrs
Acquisition and disposal	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified
Raising capital	qualified	qualified	qualified	"ancillary" but fully taxable, i.e. financial leases (credit-financed)	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified
Ancillary Services	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	"ancillary" but fully taxable	qualified	qualified
Limitations	own assets	own assets	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified
Development	own assets	own assets	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified	qualified
Internal / external GAV limit	sep. legal entity		single dev. max. 40%	max. 20%		single dev. max. 30%	max. 20%		max. 20%	own account only	max. 50%	qualified	n/A
Holding period		min. 5yrs				min. 3yrs					min. 7yrs		max. 30% min. 3 yrs
Status													
Asset Test	no restrictions	immovable property	max. 20% of GAV into single purpose	max. 20% of GAV into single purpose	max. 10% mortgage bonds	max. 75% assets property rental business	max. 75% qualified investments	max. 80% qualified investments	max. 40% GAV single property investment	max. 80% qualified investments	max. 80% qualified investments	max. 20% GAV single property investment	max. 40% GAV single property investment
Income Test	no restrictions	no restrictions	max. 75% of total assets	max. 75% of total assets	max. 10% in service	max. 40% GAV single asset	max. 75% qualified income acc. Company by-laws (max. 30% EBITDA interests)	max. 80% qualified income acc. Company by-laws (max. 30% EBITDA interests)	max. 30% separate real estate securities issued by single real estate company	max. 80% qualified income acc. Company by-laws (max. 30% EBITDA interests)	max. 80% qualified income acc. Company by-laws (max. 30% EBITDA interests)	max. 70% qualified income acc. Company by-laws (max. 30% EBITDA interests)	min. 75% qualified income acc. Company by-laws (max. 30% EBITDA interests)
Bearing Test	no restrictions	no restrictions	max. 75% of total assets	max. 75% of total assets	max. 10% in service	max. 40% GAV single asset	max. 75% qualified income acc. Company by-laws (max. 30% EBITDA interests)	max. 80% qualified income acc. Company by-laws (max. 30% EBITDA interests)	max. 30% separate real estate securities issued by single real estate company	max. 80% qualified income acc. Company by-laws (max. 30% EBITDA interests)	max. 80% qualified income acc. Company by-laws (max. 30% EBITDA interests)	max. 70% qualified income acc. Company by-laws (max. 30% EBITDA interests)	min. 75% passive investments
Distribution Test	100%	Min. 80%	min. 50%	min. 85%	min. 50%	min. 80%	min. 90%	min. 80%	n.A.	min. 90%	min. 80%	min. 90%, 100% for development activities	min. 85%
Tax	0% Tax (effectively exempt?)	tax exempt	10% of GDP interest rate plus 1%	tax exempt	tax exempt	tax exempt	Fully tax exempt	tax exempt	tax exempt	tax exempt	0% Tax (effectively exempt? unless dividends distributed to foreign shareholder not subject to withholding tax in country of residence)	tax exempt	tax exempt
REIT Level	Tax exempt, unless distributed	Tax exempt, unless distributed	tax exempt	tax exempt	tax exempt	tax exempt	tax exempt	Ordinary corporate taxation	tax exempt (if subject to conditions)	not taxable / conditions	0% corporate income tax	2% transfer tax	tax exempt, unless distributed
Capital Gains	15% but tax credit in DTT case possible	15%-25%, depending on economic situation and DTT case possible	n/A	15% but tax credit in DTT case possible	n/A	20% but tax credit in DTT case possible	25% + 5.5 solidarity surcharge = 26.375% total but tax credit in DTT case possible	20% but tax credit in DTT case possible	24.5% but tax credit in DTT case possible	not taxable / conditions	0% corporate income tax	2% transfer tax	tax exempt, unless distributed
Corporate Governance	yes, provided foreign REIT meet all requirements for FBI	not eligible	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC	yes, provided foreign REIT meet all requirements for SIC
Regime eligible for origin test and tax exemption	yes, provided foreign REIT meet all requirements for FBI	ordinary treatment for non-resident corporate	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%	ordinary treatment for non-resident corporate at 33.99%
Tax treatment	0% Tax (effectively exempt?)	tax exempt	10% of GDP interest rate plus 1%	tax exempt	tax exempt	tax exempt	Fully tax exempt	tax exempt	tax exempt	tax			
Articles	n/A	violation of (single) SICAFI conditions	violation of regime conditions	violation of single SIC conditions	violation of angle regime conditions	violation of certain REIT conditions, ex minor	violation of angle regime conditions	violation of angle SICAFI conditions	violation of regime requirements	violation of information obligations	violation of information obligations	violation of information obligations	violation of regime requirements
Penalty	constant breach of single regime requirements	constant breach of (single) regime requirements	n/A	constant breach of (single) regime requirements	systematic breach / failure of conditions	constant breach of regime requirements over 10 year period	constant breach of (single) regime requirements	shortfall of distribution, breach shareholder requirement	arrangements with purpose of tax avoidance	violation of regime requirements	violation of regime requirements	violation of regime requirements	violation of regime requirements
Loss of status							Delisting and Trading	constant breach of asset and income test					
Assumption	Rules applicable for qualifying Income												